
IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

JAMES G. KIDWELL,

Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
a corporation,

Defendant in Error.

Writ of Error to the District Court of the United
States For the District of Oregon.

TRANSCRIPT OF RECORD.

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No.

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Defendant in Error.

**Names and Addresses of Attorneys
upon this Writ:**

For the Plaintiff in Error:

Sharpstien & Sharpstien,
King & Saxton,

Walla Walla, Wash.
Yeon Bldg., Portland, Ore.

For the Defendant in Error:

W. W. Cotton,
A. C. Spencer,

Wells Fargo Bldg., Portland, Ore.
Wells Fargo Bldg., Portland, Ore.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

	Page
Answer	18
Assignments of Error.....	174
Bill of Exceptions.....	39
Bond	175
Bond on Removal.....	15
Citation on Writ of Error.....	179
Complaint	1
Deposition of Albert Noe.....	154
Deposition of J. T. Sullivan.....	157
Exception No. 1	40
Exceptions, Bill of.....	39
Exhibit No. 1, Plaintiff's.....	161
Judgment	39
Motion for a Nonsuit, etc.....	164
Opinion on Motion for a Nonsuit.....	165
Order Allowing Bill of Exceptions.....	171
Order Allowing Writ of Error.....	174
Order Enlarging Time to File Record.....	181
Petition for Removal.....	8
Petition for Writ of Error.....	172
Plaintiff's Exhibit No. 1.....	161
Reply	35

TESTIMONY ON BEHALF OF PLAIN- TIF:

BURK, FRANK W.....	131
Cross-examination	132
Redirect Examination.....	138

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
	Recross-examination	140
	Redirect Examination	149
BURK, JOHN L.		129
	Cross-examination	130
	Redirect Examination	130
KIDWELL, JAMES G.		40
	Cross-examination	61
	Redirect Examination	78
	Recross-examination	80
	Recalled	93
	Cross-examination	96
	Redirect Examination	103
	Recalled	160
LACEY, FRANK		103
	Cross-examination	104
	Redirect Examination	108
LONERGAN, JAMES C.		90
	Cross-examination	92
LONERGAN, JOE		108
	Cross-examination	113
POLLMAN, WILLIAM		149
	Cross-examination	151
TROWBRIDGE, H. H.		81
	Cross-examination	84
Writ of Error		177

*In the District Court of the United States for the
District of Oregon.*

BE IT REMEMBERED, that on the 24 day of April, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Transcript on Removal in words and figures as follows, to wit:

[Complaint.]

*In the Circuit Court of the State of Oregon for the
County of Baker.*

JAMES G. KIDWELL,

Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD COM-
PANY, a corporation,

Defendant.

Plaintiff for cause of action against the defendant,
ALLEGES:

I.

That the defendant, The Oregon Short Line Railroad Company, is a corporation organized and existing under the laws of the State of Utah as a common carrier of passengers and freight for hire, and at all the times herein mentioned was and still is engaged as such common carrier in the operation of a line of railroad extending from Huntington, Oregon, to American Falls, Idaho.

II.

That the Union Pacific Railroad Company is a cor-

poration organized and existing under the laws of the State of Utah as a common carrier of passengers and freight for hire, and at all the times herein mentioned was and still is engaged as such common carrier in the operation of a line of railroad from Granger, Wyoming, to Omaha, Nebraska.

III.

That the aforesaid railroads form a through and connected line of railroad between Huntington, Oregon, and Omaha, Nebraska. That the defendant and said Union Pacific Railroad Company by mutual traffic arrangement as such common carriers at all the times herein mentioned received at all stations on their respective railroads freight for transportation to and from all stations upon such through and connecting line between Huntington, Oregon, and Omaha, Nebraska.

IV.

That on the 4th day of December the defendant at its railroad station at Huntington in the State of Oregon, received 398 head of fat cattle in good health and condition of the average weight of 1250 pounds each, the property of plaintiff, for transportation over the aforesaid railroad lines of defendant and the said Union Pacific Railroad Company to South Omaha, Nebraska, through such intermediate point upon the railroad lines operated by the defendant and said Union Pacific Railroad Company as the plaintiff might thereafter in due time designate; said stock to be consigned to the plaintiff at such point of destination;

that the said defendant received said cattle for transportation as aforesaid under the regular tariffs and charges of said defendant and said Union Pacific Railroad Company as arranged by said defendant and said Union Pacific Railroad Company under their mutual traffic arrangement as hereinbefore set forth; that said cattle were billed to the plaintiff as consignee at Minnedoka in Idaho on the line of defendant's line of railroad, it being the intention of plaintiff as known to said defendant to continue the transportation of said cattle from Minnedoka to South Omaha; that said cattle upon arrival at American Falls were billed by the said defendant over its line of road and the line of road of the Union Pacific Railroad Company under the traffic arrangement and agreement as hereinbefore referred to, and that they were thereupon transported from said American Falls to South Omaha over the line of defendant and the line of said Union Pacific Railroad Company consigned to plaintiff at South Omaha; that said cattle were destined for the market at South Omaha, which fact was known to the defendant.

V.

That the said defendant and the said Union Pacific Railroad Company failed and neglected to perform their duties as such common carriers in and about the transportation of said cattle as aforesaid in this: that at divers occasions while said cattle were in transit between Huntington, Oregon, and South Omaha, Nebraska, the said cattle being then and there

confined and carried in cars in which it was impossible to give them proper or any food, water space or opportunity to rest, were transported and carried, and required by the said defendant and the said Union Pacific Railroad Company to remain confined in such cars for longer periods than 28 consecutive hours without unloading or permitting them to be unloaded from said cars for rest, water or food, and without any opportunity whatever for said cattle or any of them to receive such rest, water or food; that the defendant and the said Union Pacific Railroad Company were never at any time prevented from unloading said cattle for such purposes more frequently and at all proper times by reason of storms or other accidental causes of any nature; said cattle through their transit as aforesaid were by reason of the carelessness and negligence of the defendant and the said Union Pacific Railroad Company permitted and required to remain stationary while confined in said cars for a long and unreasonable period of time upon side-tracks at various stations of the said defendant and the said Union Pacific Railroad Company; that throughout the transportation of said cattle from Huntington to South Omaha the train and trains upon which they were being carried were so carelessly, negligently and roughly handled by the employes of the said two railroad companies in charge thereof that said cattle were frequently thrown down, bruised and maimed; that throughout the transportation of said cattle said two railroad

companies wrongfully, carelessly and negligently permitted and caused the transportation of said cattle between said Huntington and South Omaha to be unusually delayed and said transportation between said two points consumed an unreasonable and unusual length of time, which delay and unreasonable length of time occupied in the transportation of said cattle could have been prevented by the exercise of the care and diligence required of said two railroad companies as such common carriers.

VI.

That by reason of the failure of the said defendant and the said Union Pacific Railroad Company to permit said cattle to be watered, fed and rested at proper times and by reason of their carelessness and negligence in requiring said cattle to remain confined in the said cars for such long periods of time without giving them opportunity for food, rest and water, and by reason of their bruised, maimed and weakened condition caused by the carelessness and negligence of said two railroads and the unnecessary delay in the transportation of said cattle, the said cattle during their transportation were unable to be properly fed and nourished and were rendered incapable of being properly nourished and fed; that by reason of the careless and negligent acts of the two railroad companies as aforesaid the said cattle arrived at the destination at South Omaha at a greatly reduced, deteriorated and weakened condition with a loss in weight to each of said cattle of 72 pounds more than the shrinkage

which they would have sustained from the transportation excepting for the careless and negligent acts of the defendant and said Union Pacific Railroad Company as herein alleged while they were in transit.

VII.

That upon the arrival of said cattle at Omaha if said cattle had been subjected to only the usual and ordinary hardships incident to their transportation between Huntington and South Omaha, and but for the careless and negligent acts of the defendant and said Union Pacific Railroad Company as herein alleged their value would have been \$5.00 per hundred weight at said South Omaha, and the plaintiff would have sold them at such price, but owing to their reduced and deteriorated condition caused solely by the aforesaid careless and negligent acts of said two railroad companies in transporting them the value thereof became greatly lessened, and was reduced to the sum of \$4.27 per hundred weight; that plaintiff was compelled to and did sell said cattle at such last named price in South Omaha, which was the best and highest price attainable therefor; that by reason thereof the plaintiff on account of the careless and negligent acts of the two railroad companies in the transportation of said cattle as herein alleged suffered damage in the sum of \$4627.00, and by reason of the failure of the said defendant, the Oregon Short Line Railroad Company, to permit said cattle being unloaded and fed at seasonable and proper times and places during their transit, the plaintiff was compelled to

pay for the maintenance of said cattle while en route \$300.00 more than he would have been compelled to pay if the defendant had permitted them to be fed and cared for during their transit over its line at seasonable and proper times and places, and that such extra expense was the result solely of the carelessness and negligence of the defendant.

VIII.

That while said cattle were so in transit and in the possession of the defendant the plaintiff complained to the said defendant both at Minnedoka and at American Falls, and at other places and notified the said defendant that he expected to hold it liable for his loss and damage by reason of the negligent and careless handling of said cattle and delay in the transportation thereof.

IX.

Immediately upon the arrival of said cattle at South Omaha the plaintiff notified the Union Pacific Railroad Company of his claim for damages by reason of the careless and negligent handling of said cattle by the said defendant and the said Union Pacific Railroad Company.

WHEREFORE, plaintiff prays judgment against the defendant, The Oregon Short Line Railroad Company, for the sum of \$4927.00 and the interest from the 20th day of December, 1909, and for his costs and disbursements herein.

JOHN L. SHARPSTEIN, and
FRANK B. SHARPSTEIN,

Attorneys for Plaintiff.

STATE OF OREGON,
County of Multnomah,—ss.

I, James G. Kidwell, being first duly sworn, say:
That I am the plaintiff in the foregoing cause of action;
that I know the contents of the foregoing complaint and believe the same true.

JAMES G. KIDWELL.

Subscribed and sworn to before me this 25 day of
March, 1911.

F. J. GETTRELL,
Notary Public for Oregon.

[Endorsed]: Filed March 29, 1911.

A. B. COMBS, Jr.,
Clerk.

[Petition for Removal.]

(Title)

Your petitioner, Oregon Short Line Railroad Company, a corporation, the defendant above named, by this, its petition, respectfully shows to this Honorable Court:

That this is an action at law of a civil nature, and the matter and amount herein in dispute between the plaintiff and your petitioner exceeds the sum or value of \$2,000.00 exclusive of interest and costs, to-wit the sum of Four Thousand Nine Hundred Twenty-seven (\$4,927.00) Dollars and interest thereon from December 20, 1909. That this action was commenced in the above entitled Court on the 29th of March, 1911, and that Summons issued out of said Court in said

cause on the 29th day of March, 1911, and the said Summons was served upon this defendant at Huntington, Oregon, in the County of Baker, State of Oregon, on the 3rd day of April, 1911; and that by the laws of the State of Oregon, and by the rules of the above entitled Court in which said action was brought, and is now pending, this defendant is not required to answer or plead to plaintiff's complaint in said suit until the 13th day of April, 1911; no summons or other processes having been served upon the defendant above named until April 3, 1911, as aforesaid.

That there is in said action a controversy wholly between citizens of different states.

That your petitioner, Oregon Short Line Railroad Company, a corporation, was at the time of the commencement of this action, and ever since has been, and is now a corporation organized and existing under and by virtue of the laws of the State of Utah, and no other state; and that it was at the time of the commencement of this action, and ever since has been, and is now a resident and citizen of the State of Utah and no other state; and it never was or is not now a resident or citizen of the State of Oregon.

That the plaintiff James G. Kidwell, was at the time of the commencement of this action, and ever since has been, and is now a resident and citizen of the State of Washington, residing at Walla Walla in said state.

That this action is brought by the plaintiff to recover from the defendant, and your petitioner, a judg-

ment for Four Thousand Nine Hundred Twenty-Seven (\$4,927.00) Dollars and interest thereon from December 20, 1909, and the costs and disbursements of this action for and on account of loss and damage in the shipment on or about the 4th day of December, 1909, of certain cattle, about 398 head, from its railroad station at Huntington, in the State of Oregon, to South Omaha in the State of Nebraska; it being alleged that the plaintiff shipped three hundred ninety-eight (398) head of fat cattle in good health and condition, of the average weight of 1250 lbs., property of the plaintiff at Huntington, a railroad station of the defendant in the State of Oregon, for transportation over the lines of the defendant and the Union Pacific Railroad Company to South Omaha, Nebraska, through intermediate points upon the railroad lines operated by the defendant, and the said Union Pacific Railroad Company, as the plaintiff might thereafter, in due time, designate; said stock to be consigned to the plaintiff at such point as designated; and that the said defendant received said cattle for transportation under the regular tariffs and charges of the defendant and the Union Pacific Railroad Company as arranged by said defendant and said Union Pacific Railroad Company under their mutual traffic arrangement; that said cattle were billed to the plaintiff as consignee at Minnedoka in Idaho on the line of defendant's line of railroad, it being the intention of the plaintiff as known to the defendant to continue the transportation of the said cattle from said Minne-

doka to said South Omaha; and that the said cattle upon arrival at American Falls were billed by the defendant over its line of road and the line of road of the Union Pacific Railroad Company under the traffic arrangement and agreement between them; and that the cattle were thereupon transported from said American Falls to South Omaha over the line of the defendant and the line of the said Union Pacific Railroad Company, consigned to the plaintiff at South Omaha; and that said cattle were destined for market at South Omaha, and that such fact was known to the defendant.

That the defendant and the Union Pacific Railroad Company failed and neglected to perform their duty as such common carriers in and about the transportation of such cattle in this: That at divers occasions when said cattle were in transit, between Huntington, Oregon, and South Omaha, Nebraska, the said cattle, being then and there confined and carried in cars in which it was impossible to give them proper or any food, water space or any opportunity to rest, and were transported and carried and required by said defendant and the said Union Pacific Railroad Company to remain confined in such cars for longer periods than twenty-eight (28) consecutive hours without unloading or permitting them to be unloaded from said cars for rest, water or food, and without any opportunity whatever for said cattle or either of them to receive such rest, water or food.

And it is further alleged that the defendant and the

said Union Pacific Railroad Company were never, or at any time prevented from unloading said cattle for such purposes more frequently or at all proper times by reason of storms or other accidental causes of any nature; and that such cattle through their transit and by reason of the carelessness and negligence of the defendant and the said Union Pacific Railroad Company, were permitted and required to remain stationary while confined in said cars for a long and unreasonable period of time upon the side tracks at various stations of said defendant and the said Union Pacific Railroad Company; and that throughout the transportation of the said cattle from Huntington to South Omaha, the train and trains upon which they were being carried were so carelessly, negligently and roughly handled by the employees of the said two railroad companies, in charge thereof, that said cattle were frequently thrown down, bruised and maimed, and that throughout the transportation of the said cattle, the said two railroad companies wrongfully, carelessly, and negligently permitted and caused the transportation of said cattle between said Huntington and said South Omaha to be unusually delayed, and the said transportation between said points consumed an unreasonable and unusual length of time, which delay and unreasonable length of time in the transportation of said cattle could have been prevented by the exercise of the care and diligence required by the said two railroad companies as such common

carriers; and that by reason thereof, the plaintiff sustained the loss and damage, amounting in the aggregate to Four Thousand Six Hundred Twenty-seven (\$4,627.00) Dollars, and was compelled to and did pay for maintenance of the said cattle while en route, and in addition thereto, Three Hundred (\$300.00) Dollars more than he should have been compelled to pay if the Defendant had permitted the cattle to be fed and cared for during their transportation over its lines at reasonable and proper times and places; and that such extra expense was the result solely of the negligence and carelessness of the defendant, causing th plaintiff to sustain loss, damage and expense, amounting in the aggregate to Four Thousand Nine Hundred Twenty-Seven (\$4,927.00) Dollars.

And your petitioner, Oregon Short Line Railroad Company, a corporation, denies each and every allegation or charge of carelessness, negligence or delay; or notice; and your petitioner offers herewith good and sufficient sureties for its entering in the Circuit Court of the United States, for the District of Oregon, on the first day of the next session of the said Court at Portland, Oregon, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner therefore prays that this Honorable Court proceed no further herein except to make the order of removal by law, and to accept said bond and surety, and cause the record

herein to be removed to said Court, and your petitioner will ever pray.

OREGON SHORT LINE RAILROAD COMPANY,

by CHARLES A. JOHNS,
Agent and Attorney for Oregon Short Line Railroad
Company.

P. L. WILLIAMS and
CHARLES A. JOHNS,
Attorneys for Petitioner.

State of Oregon,
County of Baker.—ss.

I, Charles A. Johns, being first duly sworn, depose and say, that I am the attorney for the Oregon Short Line Railroad Company, a corporation, the petitioner named in the foregoing petition; that as such attorney I have authority to sign the Oregon Short Line Railroad Company's name to the foregoing petition, and make this verification upon its behalf; that I have read the foregoing petition and that the same is true; of my own knowledge; that there is no officer of said Oregon Short Line Railroad Company with the State of Oregon.

(Signed) CHARLES A. JOHNS,

Subscribed and sworn to before me this 12th day
of April, 1911.

(Signed) VERA E. TAYLOR,
(Notarial Seal) Notary Public for Oregon.

And attached to the foregoing Petition is the following Affidavit:

STATE OF OREGON,
County of Baker:—ss.

I, Charles A. Johns, being first duly sworn, say, that I am one of the Attorneys for the defendant, Petitioner herein, and that I served the within Petition upon the plaintiff on the 12th day of April, 1911, by depositing a copy of such Petition for removal, duly certified to by me as such attorney, in the post office at Baker, in the County of Baker, State of Oregon, with postage fully prepaid thereon, addressed to John L. Sharpstein and Frank B. Sharpstein, the attorneys for plaintiff, to their office in the Baker-Boyer Bank Building at Walla Walla, Washington.

(Signed) CHARLES A. JOHNS,

Subscribed and sworn to before me this 12th day of April, 1911.

(Signed) VERA E. TAYLOR.

(Notarial Seal) Notary Public for Oregon.

Endorsed on the foregoing as follows:

Filed: April 12, 1911.

A. B. COMBS, Jr.,
Clerk.

[Bond on Removal.]

(Title)

KNOW ALL MEN BY THESE PRESENTS:
That we, Oregon Short Line Railroad Company, a corporation, as principal, and C. J. Johns and C. K. DeNeffe, as sureties, are holden and stand firmly bound unto the plaintiff, James G. Kidwell, in the

penal sum of Five Hundred (\$500.00) Dollars, for the payment whereof well and truly to be made unto the said plaintiff, James G. Kidwell, his heirs, representatives and administrators, we bind ourselves, jointly and severally, our heirs, executors, successors and assigns firmly by these presents upon the condition nevertheless that:

WHEREAS, the Oregon Short Line Railroad Company, a corporation, has filed its petition in the Circuit Court of the State of Oregon for the County of Baker for the removal of a certain cause therein pending, wherein James G. Kidwell is plaintiff and the Oregon Short Line Railroad Company, a corporation, is defendant, to the Circuit Court of the United States in and for the District of Oregon.

Now, if said Oregon Short Line Railroad Company, a corporation, shall enter in said Circuit Court of the United States on the first day of its next session at Portland, Oregon, a copy of the record in said action, and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States if said Court shall hold that the said action was wrongfully or improperly removed, thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

In Witness Whereof, we, the said Oregon Short Line Railroad Company, a corporation, and C. J. Johns and C. K. DeNeffe have hereunto set our hands and seals this 12th day of April, 1911.

OREGON SHORT LINE RAILROAD COM-
PANY,

By CHARLES A. JOHNS,
Its Attorney.

C. K. DeNEFFE, Surety. (Seal.)

C. J. JOHNS, Surety. (Seal.)

CTATE OF OREGON,

County of Baker—ss.

I, C. J. Johns, and I, C. K. DeNeffe, make solemn oath and each for himself says, that I reside in Baker, County of Baker and State of Oregon; that I am a free holder in said county, and am worth the sum of Five Hundred (\$500.00) Dollars over and above his debts and liabilities, exclusive of property exempt from forced sale of execution.

(Signed)

C. J. JOHNS.

C. K. DeNEFFE.

Subscribed and sworn to before me this 12th day of April, 1911.

(Signed)

VERA E. TAYLOR,

(Notarial Seal)

Notary Public for Oregon.

Endorsed on the foregoing as follows: The within undertaking is approved this April 12, 1911.

(Signed)

WILLIAM SMITH,

Judge of the 9th Dist. of Oregon.

[Endorsed]: Filed April 12, 1911.

A. B. COMBS, Jr.,

County Clerk.

And Afterwards, to wit, on the 7 day of September,

1911, there was duly filed in said Court, an Answer in words and figures as follows, to wit:

[Answer.]

(Title)

Comes now the Oregon Short Line Railroad Company, the defendant herein, and for answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Admits the allegations contained in paragraph II of the complaint.

III.

Denies each and every allegation contained in paragraph III of the complaint, except that defendant admits that the line of railroad of the Oregon Short Line Railroad Company and of the Union Pacific Railroad Company have a physical connection and operate under joint traffic arrangements.

IV.

Denies each and every allegation contained in paragraph IV of the complaint, except that defendant admits that on or about the fourth day of December, 1909, this defendant received from The Oregon Railroad & Navigation Company at Huntington, Oregon, a shipment of live stock consisting of sixteen carloads, for transportation from Huntington, Oregon, to Min-

idoka, Idaho, to be there delivered to James G. Kidwell, the plaintiff herein; admits that thereafter the defendant, acting upon the instructions of the plaintiff herein, forwarded said shipment from Minidoka, Idaho, over its line of railroad to a connection with the Union Pacific Railroad Company, who in turn transported said shipment to South Omaha, Nebraska.

V.

Denies each and every allegation contained in paragraph V of the complaint.

VI.

Denies each and every allegation contained in paragraph VI of the complaint.

VII.

Denies each and every allegation contained in paragraph VII of the complaint.

VIII.

Denies each and every allegation contained in paragraph VIII of the complaint.

IX.

Denies each and every allegation contained in paragraph IX of the complaint.

And for a further and separate answer and defense to plaintiff's complaint, defendant alleges:

I.

That it is now and at all the times herein mentioned has been a corporation duly organized and existing under the laws of the State of Utah and engaged in the operation of a line of railroad extending from

Huntington, in the State of Oregon (at which point it has a physical connection with the line of railroad of The Oregon Railroad & Navigation Company) to Granger, in the State of Wyoming, at which point it has a physical connection with the line of railroad of the Union Pacific Railroad Company, which in turn operates a line of railroad extending to South Omaha, Nebraska; that it is and was at all the times herein mentioned engaged in interstate commerce and subject to all the terms and provisions of an Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" and acts amendatory thereof.

II.

That on and prior to the dates of the movement of the shipment of live stock herein referred to, this defendant and The Oregon Railroad & Navigation Company and the Union Pacific Railroad Company posted, published and filed with the Interstate Commerce Commission at Washington, D. C., and with and as a part of its tariff as required by law, its rules and regulations affecting and governing the transportation and carriage of live stock, and at all the times herein mentioned said rules and regulations were in full force and effect, and the shipment here referred to moved under and pursuant to said rules and regulations, and not otherwise.

III.

That said rules and regulations, posted, published and filed as hereinbefore referred to, provide among other things as follows, to-wit:

“13. TIME TABLES AND SCHEDULES for the movement of trains may be varied by the companies at their pleasure or convenience. They do not undertake to carry live stock to arrive at any market point on any particular market day or market hour, nor are their time cards and time tables to be regarded as an undertaking by the companies to deliver at the hours or times therein fixed.”

“Rates named in the company’s tariff applying on live stock are subject to rules and conditions of the current live stock contract.”

In said current live stock contract it is provided, among other things, as follows:

“Agents of the railroad company are expressly forbidden to contract for delivery of live stock at any specified time or for any particular market, and no agent of any carrier may, under any circumstances, alter, change or modify or agree to alter, change or modify any of the terms of this contract.

“It is expressly agreed that this contract and the responsibility of all the carriers over whose lines the shipment may pass, is limited and controlled by the conditions herein contained, which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable. * * *

“It being understood that each and every condition of this agreement shall inure to the benefit of each and every carrier over whose line said stock may pass under this contract.”

“No carrier shall be liable for any loss or damage

to said stock by causes beyond his control. * * * Shrinkage in weight, changes in weather, heat, cold or any other causes not directly the result of gross negligence on the part of said carriers, their agents and servants.

"The shipper expressly agrees to load, unload and care for said stock while upon the cars or premises of the carrier, in a careful and humane manner in strict compliance with the laws of the United States and of each and every state through which said stock may be transported.

"Unless claims for loss, damage or detention are presented within ten days from the date of unloading of said stock at destination and before said stock has been mingled with other stock, such claim shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability."

Said current live stock contract referred to is in words and figures as follows, to-wit:

Form 776

(Duplicate.)

8-05—10,000

(Standard)

THE OREGON RAILROAD & NAVIGATION
COMPANY.

Limited Liability Live Stock Contract.

Read this Contract.

No. 355

Baker City, Oregon, Station. Dec. 3, 1909.

THIS AGREEMENT, made this Third day of December, 1909, by and between The Oregon Railroad & Navigation Company, hereinafter called the carrier,

and J. G. Kidwell of Baker City, Oregon, hereinafter called the shipper:

WITNESSETH, That the said shipper has delivered to the said carrier sixteen cars of Cattle consigned to J. G. Kidwell at Minidoka destination, via Hunt, to be transported upon the conditions hereinafter set forth over the line of The Oregon Railroad & Navigation Company to Huntington (Insert only a station on O. R. R. & N.) and there deliver to the consignee, owner, or order; or to such company or carrier (if the stock is to be forwarded beyond said station) whose line may be considered a part of the route to destination, it being understood that in and about the delivery of said stock to such connecting carrier The Oregon Railroad & Navigation Company acts only as agent for the consignee or owner, and that the liability of each carrier hereunder shall cease and determine upon delivery of said stock to the next connecting carrier, the consignee or owner.

It is expressly agreed that this contract and the responsibility of all the carriers over whose lines the shipment may pass is limited and controlled by the conditions herein contained, which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. It is further agreed and understood that the person delivering to this company the shipment or any part thereof described herein is authorized to sign this contract for

and on behalf of the shipper, with full power in the premises.

NOTICE.

Blooded animals, or animals deemed especially valuable, will be carried only on special contract, and railroad agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignor and the railroad company or its duly authorized agent.

Men only, in charge of stock may accompany the same upon the rules and regulations set forth in circulars issued by the railroad company, and upon executing the release of liability printed on back hereof.

Agents of the railroad company are expressly forbidden to contract for delivery of live stock at any specified time, or for any particular market; and no agent of any carrier may under any circumstances alter, change or modify, or agree to alter, change or modify any of the terms of this contract. Special contracts can only be made by the General Freight Agent, with whom the Agent, upon request of the shipper, will communicate by wire.

THIS DOCUMENT MUST BE PRESENTED
WITHOUT ALTERATION OR ERASURE.

Said shipper for himself, the consignee or owner, agrees to pay or guarantee the freight thereon at the rate of \$93.40 per standard car of 29 to 30½ ft. in length, (subject to established per cent. decrease or increase applicable to cars of less or greater length), or \$.....

per hundred pounds, (subject to established minima for cars of varying lengths) as shown by Limited Liability Tariffs governing, or if in less than carload lots \$..... per hundred pounds subject to the established minima as provided by current classifications, which rate is less than the regular tariff rate for the transportation of live stock at carrier's risk, and is given said shipper at his special request, in part consideration of his agreement to the limitation of the liability of the railroad company as a common carrier upon the terms and conditions herein set forth, which are accepted and agreed to by the shipper as just and reasonable, it being understood that each and every condition of this agreement shall inure to the benefit of each and every carrier over whose line said stock may pass under this contract.

In consideration of the special reduced rate herein provided for the transportation of the live stock above-described it is hereby stipulated and agreed as follows:

1. The carriers shall not be liable for the loss or death of, or for any injuries received by any of said stock unless the same is the direct result of willful misconduct or actual negligence of said carriers, their agents, servants, or employes.

2. It is expressly agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to-wit:—†

Horses, mules or jacks, not exceeding \$..... per head; oxen, bulls or steers, not exceeding \$50 per

head; cows, not exceeding \$..... per head; hogs or calves, not exceeding \$..... per head; sheep or lambs, not exceeding \$..... per head;

and in no event shall the carrier's liability exceed \$1,000 upon any carload, such valuations being those whereon the rate of compensation to said carriers for their services and risk connected with the transportation of said live stock is based.

3. The shipper agrees to load, unload and reload all said stock at his own expense and risk, and to feed, water and tend the same at his own expense and risk while it is in any stockyards, whether the same be operated, owned or controlled by said carriers or otherwise, and while on the cars or at feeding points, or at any place where the same may be unloaded for any purpose whatever.

4. The shipper assumes the exclusive duty of properly and securely fastening said stock in the cars, and of removing them therefrom, and of keeping such cars, and any enclosure in which said stock may be confined, securely locked or fastened so as to prevent escape of stock therefrom. The shipper agrees to inspect the cars in which said stock is to be transported, and any yards or enclosure on the premises of the railroad company into which said stock may be unloaded, and satisfy himself that they are sufficient and safe and in proper order and condition; and shall report to the agent or employees of said carrier any visible defects therein, and demand necessary repairs before proceeding to occupy said cars or enclosures; and the

fact of his loading said stock into said cars or occupying said enclosure shall be an acknowledgment and acceptance by him of the sufficiency and suitability in every respect of said cars and enclosures for the shipment and yarding thereof; and he hereby assumes all risk of injury which said live stock or any of them may receive in consequence of any of them being wild, unruly, weak, maiming each other or themselves; by or in consequence of heat or suffocation, or any other ill effects of being crowded or injured; by the burning of straw, hay or other material loaded with or used for feeding the stock or otherwise; and also all risk of damage which may be sustained by reason of delay in transportation, and all risk of escape of any portion of said stock; or loss or damage from any other cause or thing not resulting from the willful negligence of the carriers, their officers, agents or employes.

5. If the carriers or any of them shall furnish any laborer or laborers to assist in loading or unloading said stock at any point, no additional charge being made therefor, such laborer or laborers shall while so engaged be deemed exclusively the employes of the shipper and no carrier shall in any event be liable for any act or thing done or omitted to be done by such laborer or laborers in connection with said stock while so engaged.

6. If the car or cars wherein said stock is to be transported shall be furnished by the shipper and tendered to the carriers for that purpose, said shipper assumes all risk for, in, and about said car or cars,

and no liability or responsibility shall attach to any carrier or carriers under this contract arising from or growing out of any insufficiency or defect in the condition of any such car or cars.

7. No carrier shall be liable for any loss or damage to said stock by causes beyond its control, by floods, fire, quarantine, disease, riots, strikes, or stoppage of labor; shrinkage in weight, changes in weather, heat, cold, or any other cause not directly the result of gross negligence on the part of said carriers, their agents and servants.

8. The shipper expressly agrees to load, unload, and care for said stock while upon the cars or premises of the carriers, in a careful and humane manner, in strict compliance with the laws of the United States and of each and every state through which said stock may be transported.

9. Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock, shall have the benefit of any insurance that may have been effected thereupon.

10. The rules, regulations and conditions prescribed by the carriers for the transportation of live stock, as evidenced by their published tariffs, classifications and circulars in force and effect, are binding

upon the shipper. The signing of this contract by the shipper or his agent shall be conclusive evidence of knowledge, assent and agreement to each and every stipulation and condition thereof by said shipper.

THE OREGON RAILROAD & NAVIGATION
COMPANY.

By M. H. DAUGHERTY,
Station Agent.

Witness my hand J. G. KIDWELL,
Shipper.

By
Shipper's Agent.

H. L. BRAGG,
Witness.

*Erase the word "head" when stock is forwarded in car loads, and the word "cars" when number of head is to be specified.

†Agent will insist upon shipper making the insertion in the blank spaces on this contract showing the valuation of the live stock to be shipped.

Copy Duplicate

No of Way Bill	Car No.	Initial
2406	76109	S P
2407	75758	S P
2408	60868	U P
2409	14335	M & T
2410	60154	U P
2411	14038	O S L
2412	13185	O S L

2413	75848	S P
2414	61506	U P
2415	14495	M & T
2416	13169	O R & N
2417	60323	U P
2418	13303	O S L
2419	14364	M & T
2420	13288	O S L
2421	76120	S P

Endorsement on back:

Duplicate

THE OREGON RAILROAD & NAVIGATION
COMPANY.

Limited Liability

Live Stock Contract.

Executed by J. G. Kidwell at Baker City, Oregon, Station, Dec. 3, 1909, for 16 Cars of Cattle good for transportation of three (3) men. (Billing agent stamp here.) From Baker City to Minidoka, Idaho, when accompanying the stock herein described and not otherwise.

RELEASE FOR MAN OR MEN IN CHARGE.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the sum stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby voluntarily assume all risk of accident or damage to his (or their) person or property, and do hereby re-

lease and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employes or otherwise.

1. Joe Lonegon
2. H. H. Chowredge
3. J. G. Kidwell

Signature of man (or men) in charge.

(Agent will draw pen through spaces not used.)

H. L. Bragg, Witness.

The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent at destination, within 30 days from date of executing the within contract, receive ticket or tickets for the return journey.

TIME OF LOADING.

Dec. 3, 1909. Hour, 8:30 p. m. Rested at.....
Date arrived, Hourm. Date dept'r
....., Hourm.

.....
Name of Consignee.

Endorsed on back: Receipt for the Return transportation of live stock attendants.Station

.....190..... Received Drivers' Tickets as follows for Return Transportation from.....
to..... Witness.

Said current live stock contracts hereinbefore referred to and described are published and filed with the Interstate Commerce Commission with and as a part of said companies' circulars and tariffs.

IV.

That heretofore and on or about the 3rd day of December, 1909, James G. Kidwell, the plaintiff herein, delivered to The Oregon Railroad & Navigation Company, at Baker City, Oregon, sixteen carloads of wild and unruly cattle, in poor shipping condition, the exact number of which is unknown to this defendant, with instructions to transport said shipment from Baker City, Oregon, over the lines of The Oregon Railroad & Navigation Company to Huntington, Oregon, and thence to Minidoka, Idaho, over the lines of railroad of this defendant, and there deliver said shipment to James G. Kidwell, the plaintiff herein; that thereafter and in due course of business and without any unnecessary delay said shipment was transported over said lines of railroad to Minidoka, Idaho, and thereupon tendered to the plaintiff herein for delivery; that owing to the fact that a violent and unusual storm was raging at said time, and the further fact that it was almost impossible for the plaintiff to purchase feed at Minidoka for his cattle, he refused to unload same at Minidoka, and thereafter and upon plaintiff's request said shipment was transported to

American Falls, at which point said cattle were unloaded.

V.

That after unloading said stock at American Falls it was found that the storm had not abated, and that feed for said stock was very scarce, and that farmers demanded an exorbitant price therefor; that by reason thereof plaintiff reloaded and shipped his stock from said point to South Omaha, Nebraska.

VI.

That this defendant and Union Pacific Railroad Company and The Oregon Railroad & Navigation Company had, on and prior, and subsequent to December 3, 1909, in full force and effect, duly published and filed rates applying on shipments of live tstock, which rates were lower on shipments moving under the terms and provisions of the current live stock contract than were the rates on shipments transported by the railroad companies under their commonlaw liability; that by reason thereof the plaintiff requested and received the benefit of the lower rate applying on said shipment, and at said time and place executed and entered into in writing the current live stock contract commonly known and described as the Limited Liability Live Stock Contract; that said contract was executed for and on behalf of The Oregon Railroad & Navigation Company by M. H. Dougherty, who was at said time the Station Agent of said The Oregon Railroad & Navigation Company at Baker City, Oregon, and was authorized to enter into such con-

tracts on behalf of The Oregon Railroad & Navigation Company and of this defendant; that said contract was executed on behalf of the plaintiff by J. G. Kidwell, the plaintiff herein.

VII.

That said shipment was promptly transported over the lines of the defendant, railroad company, and over the lines of The Oregon Railroad & Navigation Company and of the Union Pacific Railroad Company in a proper car in due course of business, without unnecessary or unusual delay, and delivered to and accepted by the plaintiff at South Omaha, Nebraska, in the same order and condition said stock was in when received by the defendant, except ordinary and usual depreciation which all live stock in transit are liable to, and depreciation due to the poor shipping condition of said stock, and the further fact that plaintiff refused and neglected to unload and feed said stock in transit from the cars were spotted at different unloading points, and by the failure of the plaintiff or his agents to properly care for, feed and tend to said stock, and the further fact that said stock was wild and unruly and by reason thereof injured themselves and each other, and that plaintiff or his agents did not give said stock proper feed, water or attention, and was not caused by any fault, negligence or want of care on the part of this defendant, its agents or employes.

VIII.

That plaintiff failed and neglected to give notice to

this defendant of his alleged claim for loss and injury to said stock within ten days from the date of unloading of said stock at South Omaha, Nebraska, or before said stock had been mingled with other stock, and by reason thereof whatever, if any, claim plaintiff may have had against this defendant is deemed waived under the terms of said live stock contract. The shipment herein referred to is the same shipment referred to in plaintiff's complaint.

WHEREFORE, having fully answered plaintiff's complaint herein, defendant demands that this action be dismissed and it have and recover its costs and disbursements herein.

W. W. COTTON,
P. L. WILLIAMS,
A. C. SPENCER,
W. A. ROBBINS,
Attorneys for Defendant.

[Endorsed]: Answer. Filed Sep. 7, 1911.

G. H. MARSH,
Clerk.

And Afterwards, to wit, on the 12 day of January, 1912, there was duly filed in said Court, a Reply, in words and figures as follows, to wit:

[Reply.]

(Title)

Comes now the plaintiff and replying to the defendant's Answer herein, admits, denies and alleges as follows:

I.

Replying to the further and separate answer and defense of the defendant herein, plaintiff admits the first paragraph thereof.

II.

Replying to the said further and separate answer and defense of the defendant herein, plaintiff alleges that he has no knowledge or information sufficient to form a belief as to the truth of the matters and things set forth and alleged in the Second and Third paragraphs of said answer and therefore denies the same.

III.

Admits the delivery of sixteen carloads of cattle to the Oregon Railroad & Navigation Company at Baker City, Oregon, on or about the 3d day of December 1909, but denies each and every other allegation of the Fourth paragraph of defendant's said answer.

IV.

Admits that plaintiff re-loaded said cattle at American Falls, Idaho, after feeding the same at said point, but denies each and every other allegation of the Fifth paragraph of defendant's said answer.

V.

Admits the execution of what is termed by the defendant a limited liability livestock contract, but alleges that the same was executed under the condition hereinafter set forth, and denies each and every other allegation of the Sixth paragraph of defendant's said answer.

VI.

Denies each and every allegation of the Seventh paragraph of the defendant's said answer.

VII.

Admits that plaintiff did not give notice to the defendant of his said claim for loss and injury to said stock within ten days from the date of unloading said stock at South Omaha, Nebraska, except and other than the notice given by plaintiff to the Union Pacific Railroad Company, and to the agents of the defendant, as alleged in the complaint herein, for the reason that the defendant herein at said time had and maintained in said city of South Omaha, Nebraska, no office or agent other than said Union Pacific Railroad Company.

VII.

Further replying to the said separate answer and defense of the defendant herein, plaintiff alleges: that the bill of lading, termed a "limited liability live-stock contract" by the defendant and set out in defendant's said answer and defense herein, was prepared by the Oregon Railroad & Navigation Company and presented to the plaintiff for his signature; that no option or opportunity was offered or given the plaintiff to examine or accept any other or different bill of lading or any other or different rate; that the said bill of lading was signed by the plaintiff without reading or having an opportunity to read the same and without any knowledge of the contents thereof; and that said bill of lading was so signed by

the plaintiff with the understanding that it was the only bill of lading issued by the said Oregon Railroad & Navigation Company, and without any intention on the part of the plaintiff to accept the terms thereof or intention to waive any rights thereby, and was so signed without any consideration moving to the plaintiff therefor.

IX.

And further replying to the said separate answer and defense of the defendant herein, the plaintiff alleges: that the said bill of lading termed a "limited liability livestock contract" by the defendant, and set out in defendant's answer herein, in so far as it attempts to limit the liability of the defendant for any loss, damage or injury to the cattle in said bill of lading mentioned and described in plaintiff's complaint herein, is void, being in violation and contravention of Section Seven (7) of the Act of Congress, known as the Hepburn Act," passed June 29, 1906. (C. 3591, 34 Stat. 595; Fed. Stat. Ann. 1909 Supplement, pages 273, 274.)

WHEREFORE, Plaintiff demands judgment against the defendant as demanded in his complaint herein.

SHARPSTEIN & SHARPSTEIN, and
KING & SAXTON,

Attorneys for Plaintiff

[Endorsed]: Reply. Filed Jan. 12, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Tuesday, the 11 day of June 1912, the same being the 95 Judicial day of the Regular March 1912 Term of said Court; Present: the HONORABLE R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment.]

(Title.)

This cause came on regularly at this time, for further trial pursuant to continuance, Jury and attorneys present as heretofore: and thereupon motion for non-suit came on regularly for the decision and ruling of the court and thereupon after due consideration it is Ordered that motion for non-suit be and the same is hereby allowed. Whereupon it is Ordered and Adjudged that complaint herein be and hereby is dismissed and that defendant, Oregon Short Line Railroad Company, have and recover of and from plaintiff J. G. Kidwell its costs and disbursements herein taxed at \$256.85.

And afterwards, to wit, on the 20 day of September 1912 there was duly filed in said Court, a Bill of Exceptions in words and figures as follows, to wit:

[Bill of Exceptions.]

(Title.)

BE IT REMEMBERED, that at a Regular Term of the District Court of the United States for the Dis-

trict of Oregon, holden in Portland, Oregon, on June 7th, 1912, the Hon. ROBT. S. BEAN, presiding, the above cause coming on to be tried before a jury, the following proceedings were had, to wit:

EXCEPTION NO. ONE.

(Being to the ruling of the Court on)

(Defendant's Motion for a Non-suit.)

The Plaintiff, JAMES G. KIDWELL, being sworn, testified in his own behalf as follows:

I am the plaintiff; J. C. Lonergan of Portland, and H. H. Trowbridge of John Day were interested with me in these cattle; I saw these cattle first about 4 weeks before their shipment; I have been in the cattle business about 23 years, ever since I have been grown; buy and sell cattle in Oregon, Washington and Montana; raise and handle lots of cattle; I did not buy the cattle constituting this shipment, I received them; I purchased cattle the same year and for a great many years out of the same territory; the cattle which I purchased were the same kind of cattle as the cattle involved in this case but younger; the cattle which I bought were 2 and 3 years old; the cattle involved in this case were 25 head, probably 30 head, 3 year old steers, and the balance 4 and 5 year old steers, about half and half; 3 and 4 year old steers generally weigh about 75 or 100 pounds more than 2 and 3 year old steers; one bunch of these cattle which I purchased out of the same country as the cattle in this case weighed (averaged) 1228 pounds at Baker City, another bunch 1247 pounds and another

er bunch 1280 pounds; I estimate that the cattle constituting the shipment in this case would at the time they were loaded on the cars at Baker City weigh 1260 to 1270 pounds each; they had been driven about eleven miles before loading and were fed and watered up to the time we started with them; I shipped these cattle from Baker City over the O. R. & N., now the O.-W. R. & N.; made the contract with Mr. Daugherty, the agent of this O. R. & N. at Baker City; I talked with him about the conditions along the line of the O. S. L.; I told him when I ordered the cars, sixteen cars, that I wanted to ship to South Omaha with a feed in transit rate at some point in Idaho, either some point around American Falls or Minidoka; Mr. Daugherty said he had no feed in transit rate, couldn't find where there was any feed in transit rate at Minidoka or American Falls; I told him then to investigate and find out whether there was good yards at American Falls or Minidoka big enough to hold these cattle, good feed yards, if there wasn't I wanted to bill them feed in transit Pocatello; he said he couldn't give me feed in transit rate; said he had nothing in his tariff that went in there; he figured the tariff and told me there was only a small difference between a feed in transit rate and to bill them locally and he says we will just bill them locally and then if you decide to take them on, we will take them on, rebill them at so much per hundred with a minimum so much per car; well, I told him that I would bill them locally to where he would find a good yard

somewhere around Minidoka or American Falls, and if he couldn't find it, I would take them to Pocatello; this was the day I ordered the cars; the next morning the office of the O. R. & N. Co. called me up and told me that they had good yards at Minidoka, and I told them that would suit me better because it was nearer Twin Falls to bill them there; and they were billed to Minidoka; these cattle were loaded on December 3, 1909; there were 398 head, 16 cars, 25 head in each car less two; 25 head of cattle of the size of these is a proper and usual load; H. H. Trowbridge, Joe Lonergan, J. C. Lonergan's brother, and myself went along with these cattle; the cattle were loaded and ready to leave Baker City at 7:45 o'clock P. M., on Dec. 3, 1909, and we left Baker at 9:05 P. M. and arrived at Huntington at 2:30 A. M., Dec. 4; well, when I reached Huntington, I went over to the depot and asked the yardmaster what time we would get out; he said he couldn't tell me but perhaps in an hour or an hour and a half he could tell me something about it; so I waited about an hour and a half and went to him again and asked him about it. He said he didn't think we could get out before morning sometime. I said to him: "Didn't you have notice of these cattle coming?" He says "We did have notice to ship the cattle upon arrival, but we have to send to Glenn's Ferry for an engine"; "have got no power here to handle the cattle"; he says, "just as soon as that gets here we will ship you on"; well, we left Huntington; ran good speed enough going along alright any more

than we were side tracked some places along about Ontario; I don't remember the places along between Ontario and Nampa; when we got to Nampa the conductor said he had some switching to do and told us to go to lunch, which we did; we left Nampa, the run was good as far as I could see, anymore than they were side tracking and switching; we left Nampa alright and went on somewhere around Mountain Home; there they were setting out cars or picking up, somewhere along in that locality this side of Glens Ferry along this side on good track, along this side of Glens Ferry, I can't tell where it was, they were doing some switching, some heavy jamming, they jumped hard enough to knock us all off our feet, knocked us around in the caboose, awful hard jams, switching cattle; that was this side of Glens Ferry, somewhere not over fifteen miles this side of Glens Ferry; we arrived at Glens Ferry at eight o'clock p. m. on December 4th; they asked me to release the feeding risk of these cattle there; I went in and asked them what time I would get out, that was a division point; they asked me and told me I would have to release and go on and I talked to a man, I don't know whether it was the agent or not, it was the man there and he said—I asked him why "you got time to go on, why don't you take me on without release, you are not going to take 36 hours to get to Minidoka"; he said: "I don't know anything about it, those are the orders I got"; I asked him "what for," he says: "I suppose a matter of protection, that is all I know about it, it is the orders

I got"; something equivalent to that; I signed the release, we left then Glens Ferry at nine o'clock; after we got out of Glens Ferry a little ways somewhere around King Hill we were side tracked and stood a long time and jammed and switched around and bumped the cattle, bumped around all the time for quite awhile; after they switched we stood; after they got through switching they stood for a long time, I can't tell how long, but for a long time, they went on somewhere towards the top of the mountain, the top of King Hill, that is what I call King Hill, there they side tracked again, jamming the cattle again and they jammed them all the way until we got, that is side tracked more or less all the way until we got to Shoshone; the train men told me that the reason for so much side tracking was that there was a washout on the Southern between Reno maybe between Ogden and Sacramento, somewhere on that line, and the passenger trains from Portland were going around that way, going to California; we arrived at Shoshone at 3:30 o'clock a. m. on December fifth; the brakeman came into the caboose and told us that the agent said the cattle must be unloaded for feed and rest; well, I went up with Mr. Trowbridge and Mr. Longergan to the depot station and asked the night man about it; there seemed to be a night operator there; he said he wasn't the agent; I asked him where the yards were; he told me; I went up to the yards; he said the dispatcher had said to unload them; I went up to the yard for the purpose of unloading the cat-

tle; I asked if it was only a short distance why they couldn't run on; he said "I don't know anything about it, that is the order"; we went up to the yard, went up to the chutes; there are two little chutes; looked at the corral, one pen, and seen it was too small to unload the cattle, went down in it, went right down the chute, went to where there were two little troughs, no water, froze up, I guess, I don't know what the matter was; went immediately back to the night operator and told him that if that was the yard we couldn't unload there because we couldn't unload the cattle; the corral was 85 feet wide and 125 feet long; I measured it afterwards; it would take four such yards as that to feed them cattle right and water; I went down to the night operator and told him to wire the dispatcher and told him what to say, that we couldn't unload the cattle and better take them on to Minidoka; he wired him, said he did, said the dispatcher said they must be unloaded there; well, I went out with Mr. Trowbridge and looked around town—a little town; woke up two livery stable night men; they said they had no feed they could sell; I inquired about other places, if they knew of any feed; they said they didn't; I went back to the station and told the night operator to wire the dispatcher that we couldn't get any feed; the corral wouldn't hold them, we couldn't take them outside, and better run them on at once; he said he would send the wire; came back the answer "cattle must be unloaded there"; then I didn't do anything for an hour or two, hour I will say, and I

asked him if I couldn't get a messenger boy, if he couldn't, and I would pay it, and let him go up and have the agent come down; he said he didn't want to do it until daylight; he would do it after daylight, and I waited until after daylight, and we got a boy and I sent him up, or he did, rather, to the agent; said the agent would come down about nine o'clock, and the boy came back and said the agent would be down soon, but he came back and was there just about nine o'clock a. m.; I told him the trouble I had had from the time I had left, and the trouble there was there, and asked him to wire the dispatcher and tell him how it was, and run these cattle on to where they could get something to eat, feed them and rest them; he said he would and he wired him and he said the dispatcher—came back and he says the dispatcher says "if shipper doesn't unload cattle, you have them unloaded at once"; then I told him, I says "if you will—I can't unload them there; couldn't stand them on their heads and put them in them pens, but if you will put a man in charge of these cattle, Mr. Trowbridge, and we have a man Mr. Lonergan along, and we will hire such additional help as we require, and we will get feed out here at some of these farm houses a little ways out; you have them in charge and we will pay all expenses and deliver these cattle to the railroad for feed and water—rest them up"; well, he says "I have got my orders" he says; "I have an order to unload these cattle at once. I have to unload them. If you don't unload them I have got to"; he says "I

am not herding steers, I am working for the railroad company"; I says "all right, if you are not herding cattle go ahead and unload them"; in about twenty minutes he made up a crew he picked up around there of railroad men, run those cattle up to the chutes; they stayed around the chutes—Mr. Trowbridge, Mr. Lonergan and myself stayed and watched them, they stayed around the chutes between forty minutes and an hour then came back down; they left the train there and just came back down; a little fellow, heavy set man, the man in charge, I presume he was, talked to the agent probably two or three minutes, then he came over to me and said—; this little man was in charge of the train after we left Shoshone; well he said to me after he had talked to the agent, he said "if you will send a wire to"—naming the man, I can't remember his name, their division superintendent, or superintendent, or assistant superintendent, somebody in charge who had authority—"why we will run these cattle on"; he says "I am satisfied he will run them on"; he says "there is no yard at Minidoka"; he says "there is nothing there but a chute that ever I seen, for six or eight months"; he says "there was some little yard there, they burned down"; I says "if it will do any good, you write out a wire to this man and run the cattle on; take them to some place where we can unload and feed them; have to do something right away"; so he wrote out some kind of a wire to the agent and I signed it and in about thirty or forty minutes word came back to put an engine on and

take these cattle some place and unload them; when I started I said to the agent, I says, "no yards at Minidoka so this man says"; well, he says "Minidoka is where they are billed and Minidoka is where they will go"; that is all there was to it; the cattle went on to American Falls, never stopped at Minidoka at all; the railroad men couldn't unload these cattle at Shoshone, they didn't have a chance to; we left Shoshone at eleven fifteen a. m. on December fifth and arrived at American Falls just a few minutes after four o'clock that evening, probably three minutes after four; they ran the cattle across the Snake River there and stopped them; we went up to the yard, and they didn't run the cattle up for quite a little while; in the meantime we were hiring saddle horses and getting two or three men to help us; we had to take the cattle out, the yard wouldn't hold them; just a little yard or two, wouldn't hold the cattle, so we got men and saddle horses and unloaded them, part at a time and took them outside and held them and I got about a 30 or 40 acre pasture from a man by the name of Philbrick to run the cattle in that night, and I bought some hay at American Falls and had it scattered over the little pasture for the cattle; well, we commenced unloading the cattle at five o'clock; we unloaded the cattle between five and seven fifteen, about two hours, a little more than two hours unloading the cattle; Trowbridge and Lonergan and the men hired taking them out to this little pasture; it was only a short distance, probably half a mile, not that much; and I had

the hay taken out and scattered and after that we left the cattle and went to bed, stopped at a hotel called the Remington; the next morning Mr. Lonergan and Mr. Trowbridge were out ahead of me; they got saddle horses and I afterwards I went with them; I went up behind them; when I got up to the pasture I seen the cattle were all gone; I just followed up the river, there was 30 or 40 of them probably half a mile above the little pasture and they were scattered all along, I followed up about four miles and met Mr. Trowbridge coming back; he said Lonergan was up ahead and was bringing the balance back; he had seen some man there and had got a pasture there to put them in and he would take up the cattle from—he was behind you know, along down only a little ways from the pasture; so we went back and gathered them up and drove to the pasture and Lonergan brought down the others from the other pasture from above down the Snake River and we put them in this pasture, got them in sometime in the afternoon of the sixth of December; this was good pasture, lots of grass, lots of hay that had been raked up, good, and the boy, there seemed to be an old gentleman and his son and Mr. Trowbridge made arrangements with the son and the old gentleman kicked about it the next day and we bought hay from him and said that we could have the pasture until we shipped them; we kept the cattle in this pasture until December the ninth ten or eleven o'clock; they had all the feed and water they wanted, all they could eat; when these cattle reached

American Falls they were badly bruised and awfully bad shrunk, drawn, awfully drawn up and they was bruised and the hair was rubbed off lots of them; this condition was caused by bad handling and standing along siding along the railroad from Huntington to American Falls; from my experience as a cattle shipper, I would say that standing cattle on siding causes them to get nervous and restless, to fight, and lay down, get down in the car and tromp each other, jamming cattle causes them to get bruised, rubbed, they get down and rub each other, crowd up and skin up all the way along when they are jamming and unloading rough; if cattle go for a long period without food, rest or water, it causes them to get down, if you stand cattle, if you overrun them, if you keep them on cars too long, they were going to get tired, quite, and lay down and fall down and bruise up; they shrink away; they shrink all the time after they begin to bruise; if they get bruised up and sored up they begin to shrink and shrink fast; these cattle were in good condition when they arrived at Huntington, Oregon, all standing and all right; these cattle would be classed as a good bunch of Oregon cattle; they were red Durham four and five year old steers, a small per cent of threes, may be twenty-five or thirty head; cattle generally are classed as good, fine and very fine, medium and on down and feeders; these cattle would be classed, well, we figured about 75 per cent of these beef, Oregon beef; the kind of cattle we ship here to Portland and Seattle, that we do all the time,

grass beef, in the fall of the year; the balance of them were fleshy cattle; what we call killers, just kind of second class grass beef, killers.

“Q. Now what was done, if anything, at any time, between Huntington and American Falls as to paying the transportation for these cattle?

“A. I paid, at American Falls, I paid the agent there. Mr. Trowbridge and I did. We paid him the money for shipping the cattle to Minidoka.

“Q. What was done towards the shipment from Minidoka to American Falls?

“A. Nothing, none at all; just charged us the rate to Minidoka.

“Mr. ROBBINS: Just charged what?

“A. To Minidoka. We paid the regular tariff from Baker City to Minidoka, at American Falls.

“Q. Now, state if these cattle were shipped from American Falls. Were they shipped from American Falls?

“A. Yes sir.

“Q. Well, what was done in the way of entering into a contract for their shipment, if anything, and where were they billed to, if anywhere?

“A. We shipped them on December 9th at American Falls at 4:40; loaded out, billed out at 4:40 December 9th to South Omaha.

“Q. Where were they billed to?

“A. South Omaha.

“Q. Now, state when you left American Falls, if you haven't already stated, and take your run from

American Falls to South Omaha, and describe it to the jury.

"A. Well, the cattle were at 4:40 at American Falls to go, December 9th; this was 4:40 p. m., all loaded, billed, billing signed and all ready to go. I think a few minutes afterward we started; we ran for some time to some siding they called Banning—somewhere along there and side tracked for some purpose, I don't know what it was. And they side tracked again at a place called Bushod, this side of Pocatello; arrived at Pocatello at 10 o'clock, I have to look at my data, ten o'clock and something Pocatello 10:15 p. m."

Continuing, witness says: "We left Pocatello 11:30 p. m. December 9th, that is Pocatello time—not Pacific time; arrived at Montpelier at 12:20 p. m. December 10th; left Montpelier at 1:10 p. m. same day. Arrived at Green River at 10:40 p. m. same day, December 10th. Left Green River, loaded the cattle at 3:40 December 11th; left Green River at 5:45 p. m. December 11th. Were stopped at Rollins for about three hours on a siding. Arrived at Laramie at 7 p. m., the 12th. Left Laramie at 5:35 p. m. the 13th—December 13th, and arrived at North Platte at about 5:30, western time, in the evening, Dec. 14th. We next fed at Valley, place called Valley, about 30 or 40 miles this side of Omaha. We stopped for feed, rest and water at the following places: We left Baker City at 9:05 December 3, 1909; arrived at American Falls at 4:40 December 5th. I won't say 4:40, a

little after four o'clock when we got in across the falls, but unloaded the cattle between five and seven, December 5th. Reloaded the cattle December 9th at American Falls at four, the last load was ready to go at 4:40 just a minute—yes, sir, 4:40 p. m., signed up and ready to go, American Falls, December 9th, and arrived at Green River at 10:40 December 10th; arrived at Green River December 10th at 10:40 p. m. and left Green River at 3:40 December 11th, and arrived at North Platte—arrived at Laramie at 7 p. m. December 12th. Left Laramie at 5:35 p. m. December 13th, and arrived at North Platte about 5:40 p. m. December 14th. Left North Platte—I haven't got the data on that. Left North Platte on the afternoon of December 15th. Left North Platte at 3:00 p. m. Dec. 15. They were loaded at North Platte at 1:00 p. m. The first load left North Platte at 3:00 p. m. Dec. 15th, and arrived at Valley at 10 a. m. the 16th. Held the cattle at Valley from ten a. m. on December 16th until six p. m. the December 19th. Then run from there to South Omaha. We fed them all they could—all the hay they wanted and at American Falls all the pasture and all the hay they wanted in addition to that, and at Green River and Laramie and North Platte and Valley all the hay they would take. They had all the water they wanted to take, at liberty to have all the water. The run from American Falls to some coal station called Memmerer, something the other side of Montpelier, was awful bad, they were side tracking, jamming the cattle, switching, picking

up, setting out cars all the time from American Falls to Montpelier it looked like all the time—every few minutes set out cars and pick up. It is 124 miles from American Falls to Montpeiler and it took us from 4:40 December 9th until 12:20 December 10th, 19 hours and something they were setting—picking up cars, setting out cars, and they said—I was kicking a good deal, they said that the passenger trains was coming around by Portland over the Southern Pacific from Ogden around this way to get to San Francisco, that there was a washout somewhere on that road. From Kemmerer they run right along to Green River. It was alright as far as I could see. We picked up some cars, some coal cars at Kemmerer and jammed the cattle awful bad. They said there was a coal famine at Chicago and they had to take cars of coal. The run wasn't very good from Green River to Laramie. They got up a few miles the other side of Rock Springs, Wyoming, and side tracked for an hour or two; they said they had a crippled engine; they jammed a good deal along until we got to Rollins, the next morning at six o'clock, and were held three hours on a siding; they went on all right, didn't make good time; they switched a good deal. We got along to a place called Medicine Bowl—I think just a little the other side of Medicine Bowl, Wyoming, and they knocked the cars awful bad switching; they smashed two of the steers out the car windows—outside of the door. Broke the door down, that is part of it; that is, we was two short—two steers short. One steer fol-

lowed along behind the train for quite a ways—followed us. Awful bad jams. Well, we got to Laramie that night and fed the cattle until the next day, and the run was fairly good to North Platte, and they stood us on a siding there and wouldn't release the cattle; wouldn't release them, stood us about 45 minutes over time; but the run wasn't bad at all, all right, and I took it up with the Division Superintendent and they gave me a good run—went right along. From North Platte to Valley,—I wasn't on the train from Valley to South Omaha. I have shipped cattle over the Oregon Short Line previous to this shipment a good many times for years, have made shipments within the last three or four years, usually in shipping a great many cattle from Montana points, Utah and Idaho to Portland, we have run cattle from Cash Junction in Utah to Huntington in 21 hours and a few minutes over; we run cattle from Cash Junction to Huntington in 24 hours and 26 hours; run cattle from Montana points to Huntington in 28 to 31 hours—along there. These shipments were all made over the Oregon Short Line. The cattle involved in this case weighed 1083 pounds, average, when they reached South Omaha. Their condition was bad, very bad. They were drawn; the cattle were all shrunk and drawn; they wasn't filled; they were bruised and there were hairs rubbed off of them in places; looked awful bad; just down and out; what you call stale cattle. I was in South Omaha on December 20th, 1909, and was acquainted with the market price and value

of cattle there on that day. I was acquainted with the conditions; see all the sales that day. I seen cattle sold there that day at five cents a pound that weren't any better than our cattle—the cattle I was in charge of—should have been in South Omaha. Our cattle would have been worth that on Dec. 20th if they had arrived at South Omaha with only the usual and customary shrinkage and damage of transit. Our cattle were put in a pen close, they were put in pretty close, they were bruised up pretty bad and they jammed them up close together. They were sold on the open market and brought \$4.27 a hundred on an average. In the condition in which our cattle reached Omaha, they were classed, a part of them for feed, 23 head, and the balance feeders, western beef, you know, is not classed as high as eastern beef. Grain fed sell sometimes three cents higher than western grass fed cattle, but generally the difference between western beef—between feeders and western beef, runs 25 cents a hundred pounds; very often feeders sell for as much as beef—western beef. I stopped with these cattle at Valley for the reason that I thought I could make the cattle look better, fill them up and make them look better; get a little more weight on them by turning them out to pasture there and feeding hay. Thought I could weight them up better—they would weight a little more and look a little better by holding off a day or two. Along the line of the Oregon Short Line from Huntington to Omaha the weather—it was in the winter time; a little snow; probably an

inch or two of snow along from Huntington—above Huntington. I don't know whether any snow in Huntington or not. I got in there at night, left the next morning. I don't remember. A little snow along up the Snake River all the way to American Falls, probably an inch of snow there when we arrived there, and from there on into the Bear River country, going across Green River, there was quite a—maybe two or three, three or four inches of snow. I couldn't tell anything about it, only right along on the car, but I think there was three or four inches of snow, and along through Wyoming the morning I got to Rollins, there was an awful blizzard, awful blizzard there in Rollins. Two or three hours standing there, I noticed. Cleared up some time that day. It wasn't bad long. Down at North Platte, Nebraska, there was four or five inches of snow, and I think on down the Platte River had some. No, no bad storms; quite a blizzard there in Rollins, that is blowing snow; quite a wind there that morning.

“Q. Now, another thing. When you arrived in South Omaha, what was done as to paying for the transportation of these cattle from American Falls to South Omaha, if anything?

“A. I paid the—I paid the freight bill in Omaha.

“Q. That is the freight from American Falls?

“A. From American Falls to Omaha.

“Q. Do you know what the rate was you paid? I mean was it the through or local rate.

“A. They charged me the local. I think it was

fifty—it goes by the hundred over there—57 cents a hundred, I think. I am not right sure. It is right there though, to Omaha with 24,000 minimum per car, I think.

“Q. What did you do with the two bills of lading that were issued to you? The one issued at Baker, Oregon, and the one issued at American Falls

“A. I turned the bill of lading in at American Falls—I turned it in at Omaha for tickets to return to American Falls; I paid my way to Minidoka and got transportation from there to Baker. The contract I turned in from Baker to American Falls or Minidoka billing.

“Q. Now, when you were at Shoshone, did you make any effort to be transported on from Shoshone?

“A. What?

“Q. Did you make any effort yourself to get the railroad company to pull you on from Shoshone?

“A. Didn't do anything else all the time I was there.

“Q. Did you have any conversation with anybody in authority there in regard to pulling you on?

“A. I spoke to the night operator two or three times until morning. Then when the agent came down, I talked to him until they pulled us out.

“Q. Did you have any conversation with the conductor there about it?

“A. Yes, sir.

“Q. What was that conversation you had with the conductor?

"A. When I first got there, he went up with me to the yard; he went up with me to the loading chute, the second time. I went out with Mr. Trowbridge first; we went up twice. The second time I went up, he looked them over, and he said it looked very small for us, and he said 'if I had authority I could pull you on, could take you on to Pocatello on time—within the limit, thirty six hours'. That is about the conversation I had with him. He went out ahead of us, pulled the same train out, less the sixteen cars, and went on.

"Q. What sixteen cars did he leave?

"A. The 16 I had.

"Q. And pulled out the train?

A. He pulled the train out, the same tonnage; didn't side track, but pulled them on after daylight—that is the load, less sixteen cars.

"Q. Now, in reference to the claim that you made, if you made any claim there before you arrived at Omaha, or after you arrived there. State what you did in regard to making a claim against the company for damages.

"A. Well, at Shoshone, I told the agent there—called Mr. Lonergan and Mr. Trowbridge, both my men with me; Mr. Trowbridge was interested in the cattle—told the agent there that the railroad company would have to—I was going to put in a claim and he notified them to that effect, for side tracking these cattle, and handling them bad from Huntington until the time I left there. And when I got to American

Falls, I told the agent there would be a claim against the company for damages sustained and injury to these cattle. When I got to Laramie City, I told the agent there that two steers jumped out the cars around Medicine Bowl, and that the Union Pacific would pay for them, and in addition to that there would be a claim for damages on the Short Line, possibly some of it on the Union Pacific going to South Omaha; after these cattle or about the day they were sold there, and I paid the billing freight—and talked to the agent there at South Omaha, and told him the same thing. That is the man I talked to.”

Continuing the witness says: “I can’t remember how much I paid out for feed at American Falls. I paid out the night we got in there, we got all the hay we could, I think about two tons, I paid twenty dollars a ton for it, baled hay, had it hauled out. The pasture deal out there Mr. Trowbridge paid for that, I don’t remember how much, I settled with him.

“Q. I will ask you what this paper is, Mr. Kidwell, do you recognize it?

“A. Yes sir.

“Q. What is it? You may state what this is, Mr. Kidwell?

“A. It is a statement for claim that I put in against the O. S. L. and Union Pacific railways for injuries and damages sustained to the cattle.

“Q. You put that in here in Portland, did you?

“A. I did. Yes sir.

“Q. How did you come to put that claim in here at Portland?

“A. Well, I lived here and the agent at South Omaha—I had two steers killed on the Union, I took up with him, and he said take it up with the Claim Department; and he said the other claim might just as well be put in here; the main damage was on the Short Line.”

Cross Examination.

The plaintiff on cross examination testified as follows:

I am engaged in the cattle business here in Portland at the present time; my concern is known as Kidwell & Caswell; have been buying and selling cattle in the northwest territory for a good many years; have had a great deal of experience in shipping over different railroads; have shipped over the Oregon Short Line for more or less for years; ship all the time over the Short Line for the last two years; I am pretty well acquainted with the conditions surrounding the shipment of livestock on railroads and know a few things about it; I have had lots of experience; Mr. Lonergan and Mr. Trowbridge bought this bunch of cattle out in the John Day country in the summer of 1909; they took them to Bear Valley; Now I am telling you what they done, I was not there; we took them to Bear Valley and put them in pasture, good pasture they had there; after which we kept them down in Sumpter Valley and in that country when

they were moved from Bear Valley; they were range cattle when Mr. Lonergan and Mr. Trowbridge bought them; I didn't buy them; we took them from Bear Valley to Sumpter Valley, that is between Bear Valley and Baker City; fed them hay there; I don't remember how long we kept them there; it wasn't long; we fed them at Ed Cole's place near Haines, ten or twelve days before we shipped; didn't pasture them, fed them hay in his pasture, we kept them in his pasture the last day or two, but he fed them hay, ten dollars a ton every day; the pasture wasn't very good, but the hay was good; fed them all the alfalfa hay they would eat, paid for it ten dollars a ton; at the time they were at Cole's place, I figure 75 per cent of them in my judgment was beef; they was the same kind of cattle we buy in the fall of the year and ship to Portland, the Sound and all around; we did not ship these cattle to Portland or to the Sound because there was more supply of cattle than the demand was; had too many cattle at that time, which is a common thing all the time except in the spring of the year; hay was pretty scarce around Haines at that time.

"Q. Didn't have anything but wild hay and fox tail?

"A. Did they? Yes, good hay—first class.

"Q. Is that good first class hay?

"A. That is excellent—first class.

"Q. Wild hay and fox tail?

"A. That isn't wild hay; this was alfalfa; good

hay, ten dollars a ton.

I know Cole pretty well, he knows how to feed livestock pretty well; he is not an expert, he never shipped much; once in a while he makes a shipment; he feeds a little bunch of cattle every year; I buy cattle from everyone; he has sold cattle from time to time, I can't say that I ever had a great many business deals with him; I bought his cattle once or twice or three times, maybe a dozen times; brought the cattle from Haines to Baker City the same day I loaded them out, December the third; got to Baker about four o'clock in the evening, I think; I talked with Mr. Daugherty, the agent at Baker City, about shipping the stock; I don't know Mr. Noback, the bill clerk; I know Mr. Daugherty; I have shipped three or four hundred loads of cattle there every year from Baker City; I don't know Noback at all; I executed the regular livestock contract there on the shipment from Baker City; that is my signature, yes sir; that is my signature also on the back of the contract; I put the first signature on the that contract at Baker when I signed up the contract; the signature on the back for the return transportation I signed at Minidoka; I paid my fare from American Falls to Minidoka; I don't know anything about how the stock were billed out of Baker City, except that it was the regular stock contract, that is all I know about it; I had it billed to Minidoka; yes sir; I did not have it changed, I paid it up and got two billings; I don't know anything about those way bills at all; two contracts, I paid them the money

there at American Falls and signed another contract; these cattle were good Oregon steers, grass beef, Oregon steers; I think they would have an average weight of 1250 pounds a head, say 1260 or 1270; no sir, the complaint is not necessarily wrong, I didn't put it in for a lawsuit, I put it in to get settlement; I believe they weighed more than 1250 pounds; each; I never weighed them; I believe they will weigh more than what I say; they weighed that much when I loaded them at Baker City; it is a guess as to how much they would weigh there, of necessity it must be a guess; some of them might weigh less than 1250 pounds, and I think some of them would weigh more than 1300; one of them weighed only 900 pounds at Ohama; they are just the same as we buy every fall in Oregon and ship to Portland and the Sound markets for beef; 75 per cent of them is what I said; I did not say they were fair Oregon beef; good Oregon beef steers is what I said; good, grass fed steers, grass beef, is what I said; the cattle were not billed out of Baker City by weight, so much per car, the tariff is so much to Minidoka; I don't know what the minimum weight was; I don't know anything about it; never heard of any billing out of Baker City at minimum car at all until you strike the Short Line; on the O. R. & N. it is so much per car; on the Oregon Short Line, but Missouri River points is by weight; I have always understood so much per car to Portland; Short Line was so much per hundred; Short Line west is so much per car, regardless of weight; yes sir, the

Short Line. I have shipped over it, was so much per car, Minidoka to Portland, so much per car from Utah to Portland; I have had a great many years experience shipping stock and yet know nothing about a minimum rate applying to a car of stock coming west; going east, I have been mixed up, I don't always follow every shipment that goes east or west, I am not a cattle shipper, I have done a lot of it, but I am not shipping cattle; I bill cattle out just as you would buy a ticket or someone else would; I don't always look at the contracts or stipulations; these contracts change every so often; I can't tell; they don't show us only one billing; it is made up and we sign it; that is all there is to it; we fed first at American Falls.

"Q. When you left Baker City what did you intend to do with this stock?

"A. I intended to take them to Idaho and feed them hay, and some time later ship them off, if I didn't sell them; might sell them; might ship them on to Omaha or Missouri River.

"Q. In other words, you were going down to the Minidoka country to range them a while?

"A. I was not.

"Q. Well, you were going to feed them you said?

"A. If I had wanted to turn them out, I would have kept them at home where we had ranges.

"Q. Didn't you just say you took them down there to feed them hay?

"A. Feed them hay in the winter time.

"Q. As a matter of fact, when you got down there

you found there was no hay, didn't you?

"A. No.

"Q. Did you find plenty of hay at American Falls?

"A. I found hay I could buy at American Falls. I wasn't near Twin Falls; I wasn't there because they had no yard.

"Q. I didn't say Twin Falls.

"A. I found hay at American Falls; could buy it, too.

"Q. You say the hay was plentiful and the price reasonable?

"A. No, I didn't say plentiful; they offered me hay there at six dollars a ton.

"Q. Good hay

"A. Well, I couldn't say good hay; no, I couldn't say that. I never examined it because I made up my mind to ship the cattle on.

"Q. As a matter of fact when you got down there you were considerably disappointed by the conditions, weren't you?

"A. Disappointed by the railroad company's, very much so.

"Q. I know; you put that in all you want to but don't answer my question until you get ready. Now, when you got down there you were considerably disappointed by the climatic conditions, weren't you?

"A. No.

"Q. Found everything all right to range stock down there, did you

"A. I wasn't looking for range; was looking for

hay, and found it if I wanted to feed them.

“Q. Did it storm or snow any while down there?

“A. Yes, a little snow.

“Q. How much?

“A. Probably an inch around American Falls; an inch and a half maybe.

“Q. You tried to get pasture in two or three places and failed, didn't you?

“A. I tried to get pasture above there, but the old gentleman kicked about it; we fed them hay until we got ready to ship them—decided to go on with them. Didn't try very hard to get pasture; would have got it if I had.

Continuing the cross examination, plaintiff says:

I met Mr. Evans who lives up there at American Falls once; I did not try to sell him these cattle; my men might have tried to sell to him or talked to him about it, I don't know; I owned a one-fourth interest in those cattle; Mr. Lonergan one-fourth and Mr. Trowbridge one-half; they had authority to sell if they wanted to; I don't know whether they tried to sell to him or not; the time I met Mr. Evans was about six weeks before than time; I never discussd these cattle with him; I came in there on the fifth and left on the ninth; would be four days from the night of the fifth until the evening of the ninth would be four days.

“Q. And when you rebilled, what rate did you say you got?

“A. I think it was 57 cents they told me. I am not

going to be sure.

"Q. They got you a feed in transit rate?

"A. No sir.

"Q. What rate did they give you?

"A. Gave me through billing afterwards.

"Q. Where from?

"A. Well, Union Pacific. I don't know who gave it to me. I got it.

"Q. Through billing from where, I say?

"A. From Baker City to Omaha.

"Q. That is just what I am trying to get at.

"A. They gave me through billing, not feed in transit; through billing, through shipment.

"Q. Through shipment?

"A. They gave me that; they repaid me on the basis of shipment from Baker City to South Omaha; that is what they gave me. I didn't ask for it; they gave it to me.

"Q. That is the rate you got and the rate you paid?

"A. No, not the rate I paid. I paid six hundred and some dollars more.

"Q. You got your money back?

"A. Well, they gave it to me."

Continuing the cross examination, plaintiff says:

After we left American Falls, our next feeding point was Green River; we got to Green River at ten something in the evening and left the next evening; our next feeding point was Laramie City; we got to Laramie in the evening about seven, I guess, and left

the next evening at about five something; the next feeding point was North Platte; we got there at five o'clock and left there the next day at three something; Valley, Nebraska, was the next feeding point; we stopped there to fill up the cattle; tried to, stopped about three days; I don't know how many cars there were in the train including our sixteen cars; awfully heavily loaded, I know that; they were long freight trains, most of them; might have been some places where they didn't have many because they were siding a good deal, side tracking to put in and out, I couldn't tell; they were big trains mostly; our cars occupied the position next to the caboose; I didn't have them put there, they always put them there; that is where stockmen usually want them, so that they can so that they can punch up the cattle; there is considerable slack in a long freight train, I know that.

"Q. And even in a freight train handled under the most favorable circumstances, there is bound to be lots of slack in that train?

"A. Yes, where side tracking and switching.

"Q. And the same thing when stops are made; the slack will run up on the train?

"A. Yes, if they are not pretty careful.

"Q. Well, it is almost impossible, is it not, to keep that slack from running in and out?

"A. No, it isn't impossible; we do it right along on the Short Line and O. R. & N. and Northern Pacific. All of them handle stock good if they want to.

"Q. You don't undertake to say you ever saw a long freight train start or stop with slack not running in or out, do you?

"A. No, no, but then not bad, you know; they don't jam together and knock you off your feet and knock the cattle down.

"Q. Now, about this side tracking. I believe you say they had a washout down south some place?

"A. No, I don't, only what they told me. That is all I know about it. I know there was an awful lot of passenger trains going both ways.

"Q. And by reason of these passenger trains going along you had to side track a lot for them, did you?

"A. That is what the man said was the cause of it, and the great coal famine in Chicago was another cause for taking on this coal.

"Q. Beg pardon?

"A. After we got to that station Kemmerer, where there was a side track, and jamming these cars; they said there was a coal famine in Chicago, and they had orders to take the coal, they said.

"Q. So that you were side tracked more than you should have been, and that was occasioned by this washout down south, and these cars being routed north?

"A. All I know, there was passenger trains; that is all I know, lots of them.

"Q. An unusually large number of passenger trains running through there, wasn't there?

"A. Yes, sir, there was."

Continuing the cross examination, the plaintiff says:

F. A. Robinson sold these stock for me at South Omaha at an average price of \$4.27 per hundred weight; 23 head of them sold for \$4.60; 329 head of them sold for \$4.30; oh, I can't remember just how it was with reference to 33 steers selling for \$4.00. I got an average, if I remember, at the time—I know they cut out the beef out of the bruised cattle; I know they cut out the beef and sold it; I know that; when we buy cattle we generally figure on a four per cent shrink; there is no four per cent on these cattle; where you have cattle and you weigh as you take them off the feed grounds, say seven or eight o'clock in the morning, they would be full of hay and water, and you would shrink them 4 per cent; that would be four pounds a hundred; on a 1200 pound steer, you would shrink him 48 pounds, or would stand him in a corral, very often stand for a shrink, very often drive—a drive of seven or eight miles, we call the equivalent of a four per cent shrink, but where the cattle are taken right off the feed, the shrink will be 4 per cent—figure four per cent shrinkage; we always sell on a fill; we calculate a fill—that is pretty hard to say now; you can't tell how they will fill; sometimes they arrive in good condition and fill all right; feel like eating; eat and drink lots which add to their weight; under usual conditions, I fill them forty or fifty pounds, might fill them four per cent, I don't know; just de-

depends on how much they will eat; that is all there is to it, and how much they will drink; generally consider stock shrink about as much—the biggest part of it the first ten or twelve hours; that the cattle are not used to the train and get very nervous has something to do with it; you can taken them and stand them in a corral and they will shrink in ten hours just the same; no, I don't think shrink as much; and stock fed on alfalfa will shrink more than stock fed on timothy; I don't know how much more; they will shrink more the first day, you know; the first day or two they will shrink more on alfalfa than on timothy; I believe cattle shipping, they will not shrink generally as much if feeding timothy hay, as a rule; there cattle were all horned stock; they were not any more frightened at the train than any other stock; same as all range stock that is shipped.

"Q. Well, all range stock is afraid of a train, when an engine comes up alongside?

"A. Yes, afraid of a train.

"Q. And they try to climb on top of each other, don't they?

"A. Oh, I don't know. They can't in the car; cattle, you know, standing will get nervous and fret and fight. Standing is the worst thing in the world for them.

"Q. And that is what you go along with your prod pole for?

"A. Yes, to keep them up.

"Q. So, if an engine comes tooting up to the side

of a stock car, they are going to get bruised, aint they?

"A. No.

"Q. They are not?

"A. Not necessarily.

"Q. Don't bruise them to climb up on top of each other?

"A. Yes, when they do that, but they don't pay much attention to it when loaded in a car, say 25 of them, twelve or thirteen hundred pound steers—don't pay much attention to it.

"Q. Now, shipping livestock on the train is rather a hazardous thing under the best of circumstances, isn't it, for the shipper?

"A. Yes, sir.

"Q. You are taking a good many chances. Isn't that right?

"A. In what way taking chances?

"Q. Well, hazardous—liable to lose out in a good many ways?

"A. I don't know; ship all the time that way. If people were losing out all the time, so much, they wouldn't ship, I guess. When run right, there is not much danger. You can figure just as near as any other kind of business, where they are run right.

"Q. Now, assuming, Mr. Kidwell, that sixteen carloads of cattle, as you have described, go from Baker City down to Minidoka and are there about four days—practically five days, and receive the treatment that your cattle received, and then go on down to Valley and are filled, and into South Omaha, a dis-

tance of approximately fifteen hundred miles, how much would the normal shrink be on that shipment?

"A. Well, I have never shipped any; I have shipped cattle—been interested in them, but I say I never kept any tab on Omaha; have shipped other lines; can tell a distance around a thousand or twelve hundred miles—anywhere from seven hundred and ten and eleven hundred, from Utah here; about the same.

"Q. Can you answer my question? You can give us a fair estimate on that shipment under those circumstances?

"A. I think the cattle would shrink from fifty to seventy-five or eighty pounds, where they were handled right. If these cattle were handled right and went into Omaha in good condition I figure the shrink on them should be included in fifty to eighty pounds, maybe a hundred. Somewhere there if were in good shape; might have been a hundred.

"Q. Somewhere within fifty and one hundred pounds, then shrink?

"A. Yes, I should think it would be that. I never shipped cattle there; that is figured, I kept no tab on it.

"Q. What did this shipment weigh when it got down to South Omaha?

"A. What did they weigh?

"Q. Yes, what is the total weight?

"A. I can tell you in this way; they averaged 1083 pounds; there were 396 head, but I can't call to mind the exact total.

“Q. That was 428,900 pounds, wasn’t it?

“A. I think that is it.

“Q. That would make the average weight at South Omaha 1083, you say?

“A. Yes, sir.

“Q. What was the value of these steers at Baker City, per head?

“A. You mean what was the value of them?

“Q. What were they worth right there, before you loaded them on the car, per head?

“A. I don’t know what they were worth there.

“Q. Well, what did you value them at when you shipped them?

“A. Oh, they was worth about four cents a hundred, I guess.

“Q. What is that valuation in the contract? Is that 30 or 50 there?

“A. Fifty it says. They put the valuation on themselves. They had all that done. They force you to do that with these contracts, you see—\$30.00 very often.

“Q. They ask you what valuation you want, don’t they?

“A. They have only got one tariff, unless they stick you for three or four hundred; that is all they got; that is all they show you; they put it on \$30.00 and that is what they give you if they lose one.

“Q. Did you ever ask to look at any other tariff?

“A. I never saw any other except one contract. I know blooded stock—

"Q. You know under the law we are forced to take them?

"A. I don't know the law, but I know what they do, all right; know pretty well, too.

"Q. Did you ask for any other contract or any other rate?

"A. No, I didn't.

"Q. You took this one and shipped your cattle on it?

"A. Yes, have to take them or don't ship.

"Q. If you hadn't signed this, you would have had to pay a higher rate?

"A. Yes, an awful lot higher; they just fix it for you and you sign it like you buy a ticket.

"Q. So by signing this you got a lower rate than you would if you hadn't signed it?

"A. I don't know. I don't know anything about that, but I only saw one tariff.

"Q. Why, don't you know you would have to pay more if you hadn't signed that?

"A. I understand they have a higher tariff somewhere. I don't know anything about it. I never seen it, I say. That is the only one I ever saw—just one. They have it fixed for you and you sign it; if you don't sign it, you don't ship.

"Q. Anything to prevent you reading this if you want to?

"A. Yes, you can read it but you can't tell anything about the stipulations or those things.

"Q. In fact you know them all by heart anyway,

don't you?

"A. Oh, no.

"Q. Now, on direct examination, you said that you were familiar with the market price at South Omaha, December 20, 1909.

"A. Well, I was there.

"Q. Well, do you know anything about the market quotations for the previous days?

"A. Well, no. Western steers run 5 cents to 5½—along there.

Plaintiff, continuing cross examination, says:

I do not take the Daily Drover Journal from Omaha; but I keep pretty close touch; I know the Daily Drover Stockman; it generally gives you the right dope on stock; generally in all these papers, just about; I don't know whether you can rely on it or not, but in my experience the papers and market orders is about right; that is where I get my information; the Drover's Journal, in quoting price on my cattle would designate them as western beef steers; I can't remember the price of western beef steers December 16th, nor December fifteenth, nor the fourteenth any more than I seen it there at Robinson's; I was there on December twentieth the day these cattle were sold; I think the market price was about the same for a week or two there; I don't know whether my witnesses testified that the market price was higher or not; I was there; I am talking from my own point of view; it was, I think, about the same for a week or two there; the O. R. & N., now the O.-W. R. & N. runs

from Baker City to Huntington; the O. S. L., or Oregon Short Line Railroad Company runs from Huntington to Granger; and the Union Pacific Railroad runs from Granger, Wyoming, to South Omaha; I can't remember the weights that were shown on this shipment when it got in to South Omaha, per car; all I remember is the average of the steers; I can remember that very well; I wired it to Lonergan; I wired it that night and had it down in my book, just exactly what they averaged straight through, also the total, but I can't remember the total.

"Q. Each one of the cars showed a weight of 26,000 pounds into South Omaha, didn't it?

"A. I don't know anything about it what they show.

Redirect Examination.

Q. When did you get this \$600.00 you received and testified to?

A. I come right back from Omaha to Walla Walla; I lived at Walla Walla at that time, and I come right to Walla Walla and from Walla Walla right here. I don't know exactly. Just two or three days after I got here; there was a refund coming, six hundred and some dollars on this shipment on through billing, that is, they gave me the regular—made me pay just the price from Baker City to Omaha—regular tariff.

Q. You were asked about determining the weight of cattle where there were no scales, and stated that

you guessed at the weight of them. Now, what do you mean by the word "guess?"

A. Well, we—where you weigh up cattle all the time, you have a pretty good idea. In this type of cattle, yearlings, and two-year-olds, and three-year-olds, same country, same breeding, same range, and under the same conditions, you can guess right around ten or fifteen pounds of them, taking as a class—take them right along; you can guess four or five hundred of them easier than you can guess one; just take four year old steers they weigh about so much, and five year old steers, about so much. Where you are familiar with the size, you can tell pretty close to where they run.

Q. How did these cattle of yours fill?

A. They didn't fill good at all.

Q. How is that?

A. They didn't fill good at all.

Q. For what reason?

A. Because they was sore—they was sored up; cattle wont fill good when they are sored up; they wont fill good. It is like a sick man.

Q. Now, what do you mean by the word "fill?" How does this filling occur? What does it consist of? Do cattle increase in flesh?

A. No, sir, they don't increase in flesh. When you get them into the yard—any time that you start cattle they are not going to increase in flesh any after you start shipping, but you can get them in near the yard, might make them look a little better, take the

soreness out of them, get them near the yard. If you can get them hungry enough to eat and drink forty or fifty pounds of water and hay, you will have that much in your favor.

Q. That is what is meant by stockmen by "fill?"

A. Yes, sir.

Q. Is that the customary and general way of selling stock?

A. Yes, sir, that is the way we sell in the Union Stock Yards, Chicago, and everywhere else.

Recross Examination.

"Q. That is the reason our beefsteak costs us so much, is it? Now, Mr. Kidwell, you say they don't increase in flesh on the fill. Well, they don't decrease either in flesh in a short time?

"A. Oh, they are not going—any time you start cattle, they are not going to increase in flesh any; that is a sure thing, but it is a very common thing, you know, to buy cattle in the country and ship them in and weigh them on fill and get as much in the yard as you do in the country.

"Q. Let's not get away from the question.

"A. I thought that is what you wanted.

"Q. They don't decrease in flesh after the first two days, do they?

"A. Not no great lot, no. No, they wont decrease much in flesh after the first few days; not if handled right, they wont.

"Q. It isn't flesh they lose the first few days, is it?

“A. Not a great deal.

“Q. Well, in fact there is hardly any flesh that they lose, is it?

A. Oh, yes, yes, they do. We can just knock off forty or fifty pounds awful easy by standing on a siding somewhere ten or twelve hours, jamming around a little and then sell them. Yes, sir, they sweat that much out pretty easy.

Q. Can knock off forty or fifty pounds of flesh you say in how long a time?

A. Oh, they can do it in a day.

Q. In a day?

A. Yes, can do it in a day.

Q. You say knocking off fifty pounds of flesh, now; we are not talking about weight; we are talking about flesh, in one day you say?

A. Well, yes. They can shrink thirty to forty pounds in a day by standing.

“Q. In flesh?

“A. It will cause them to shrink.

“Q. I am asking if they will shrink forty to fifty pounds of flesh in a day?

“A. Might not shrink in one day, but any time standing on a siding will shrink it—if you have them two or three days longer, I will tell you that.”

H. H. TROWBRIDGE, being called as a witness on behalf of the plaintiff, testified as follows:—

I am engaged in the raising and buying of cattle in Grant County, Oregon; I bought the cattle in question here; I bought them over the telephone; a man

had 700 steers and I bought them over the telephone for myself, Lonergan and Kidwell; supposed to have seven hundred; the man was in Burns, Harney County, Oregon, when I talked to him, and the cattle were up in the mountains, on Emigrant Creek; well, they wasn't as good as we expected; they didn't come up to the contract, and we didn't take only what did come up to the contract; Lonergan and I went to cut the cattle out and we took only four hundred; I think they had six hundred and forty or six hundred and sixty, I am not sure; I know that we cut out two hundred and forty or two hundred and sixty head—out of the bunch; I mean by "cut out" that we took them out of the bunch, turned them back; after we purchased these cattle, they were delivered to us to Bear Valley, up thirty miles, I think; we pastured them there in a wild meadow pasture; good pasture; for about two weeks; and then took them to Sumpter Valley; pastured them there for a while and fed them hay when the pasture run down a little, we fed them hay; we then took them to Baker City; left them in a pasture outside of Baker a few miles for a couple of days, I think; then moved on to Haines; we had a wheat field that had been cut, but the down grain in it and seven or eight straw stacks, I think a thousand acres in the field; I don't know how long they stayed there; I left them and went home; I was in Baker when the cattle were loaded on the cars; I came back when they were shipped; these cattle were in good condition when they were loaded on the cars; they

looked as good as they did when we bought them; they were fine cattle, a good portion of them.

“Q. Have you been in the habit of buying and raising cattle in that particular section of the country over there?

“A. Yes, sir.

“Q. From your experience as a cattle raiser and buyer, could you estimate the weight of these cattle at the time that they were in Baker City?

“A. Yes, sir.

“Q. What would be that weight? What would you estimate that weight to be?

“A. About 1260 pounds, I should say they would weigh.

Continuing, this witness testified:—

I accompanied the cattle to American Falls; I did not go to Omaha; well, I didn't keep any notice of any time when arrived at the depot at any particular place; we shipped them in the evening from Baker; we got to Huntington and laid there until after daylight; they finally got us out of there and then finally got to American Falls after two or three days—fooled along the road with them; I couldn't tell you exactly when we got out of any certain place, because it was at night a good deal of the time, and the first time I was ever over the road and I don't remember the names of the stations and how long we stayed in each place; we were stood on side tracks lots; we would side track for a long time at different times; we would side track and switch; they would take on cars and

set out cars; at Shoshone they said we had to unload the cattle; we went and looked at the yard and told them we couldn't unload them; the yard wasn't large enough, so we told them we had to—we told them if we had to, if we could get hay and take them outside, we would unload them, and they wouldn't do that, and we said if we had to unload them, they would have to do it themselves, because we couldn't in those yards; if they wouldn't let us take them out, there was no question; they fooled around a while and run them up to the chute; they run them up to the chute and I suppose come to the conclusion they couldn't unload them into this yard, and come back, and Kidwell sent the wire, Mr. Kidwell sent a message and they sent it to some of the head men, and a little while afterwards they said they could run us, said they could run us on, and did do it, run us on and gave us a good run from there; I think the yardmaster probably, somebody, gave us a good run out of there and it didn't take us long to get to American Falls from there; when we arrived at American Falls the cattle were skinned up pretty bad, lots lame, drawn, looked bad; I don't know how long it took us to make the run from Baker City to American Falls; I don't know when we left Baker; Mr. Kidwell kept track of it, I didn't.

On CROSS EXAMINATION, this witness testified as follows:

Bought these cattle on Emigrant Creek, about half way between Burns and Canyon City; I said I bought these cattle over the telephone, but I did not say that

I had never seen them; I had seen about three hundred of them before; when they were delivered they did not come up to the contract, a certain amount of them did, what we took did; we took four hundred; I think it was six hundred and twenty head or forty head or sixty head, right along there; those below the specifications were a little small and not as fleshy as they should be; three year old steers didn't appear to have done very well; we took mostly four and five year old steers, but a few three; any three that was good, we took, but the largest steers were in good shape; we took them, and the youngest three year old steers, we didn't take.

“Q. You cut out the three year olds because they were young and thin, did you?

“A. Yes, they didn't fill the contract.”

Continuing, witness says:—

We put them in pasture in Bear Valley; about 700 acres in the pasture; it was in September, I guess, or October, the first of October, possibly; the pasture wasn't burned up at all; it was a mountain meadow pasture; we left them in this pasture about two weeks, I think; four hundred head in seven hundred acres; finally fed them hay, I think, before we took them away; the last week I think we fed them a load of hay in pasture; wild grass hay; bought it of Phillips; the pasture belonged to Brown & Summerville; Phillips was running it: he had bought the hay; we then brought them to Sumpter; I can't call the man's name right now that owned the pasture; it was good; had

been nothing in it; it was not burnt up or dried up at all; no, it was swampy, a good deal swampy; I don't know how many acres were in the pasture, possibly 320; the cattle were there about two weeks; we kept them there for quite a while; we fed them hay for a week or so, I can't tell how much hay we fed, cannot give an estimate, no way of telling how much we fed; then we took the cattle down to Baker in Dan Shaw's pasture; this was a nice green pasture, mostly brush, don't know how many acres were in the pasture; I suppose, two or three hundred acres, I don't know; they were in there two days; fed no hay while there; there were 400 head; did not take them from there to Ed Cole's at Haines; took them to a pasture which we bought from Sam Baer near Haines; I don't know how long the cattle stayed in the pasture, I went home; did not see them again until we got ready to ship them; I guess that was December third, I don't know; I met them down a way; helped drive them to the yard at Baker; helped load them; and was with them down to American Falls.

"Q. Now, your estimate of the weight of these cattle at Baker City is purely guess, is it?"

"A. Yes.

"Q. You didn't weigh them?"

"A. No. Had weighed a good many other cattle though before I handled these.

"Q. You didn't weigh any of these though?"

"A. No."

Continuing, the witness testified:

I think I noticed a good many passenger trains running around us; we stood on side tracks a good deal; I don't remember all that passed us; I don't know why they side tracked us; I suppose to let other trains pass; they side tracked us to let other trains go by; I did not know that there was a washout down at Reno; I heard a little of it; I might have known then that they were routing all the passenger trains over the north; I don't remember it right now; these cattle were all horned and were not very much afraid of a train; they were in a pasture at Sumpter Valley when the trains to Sumpter Valley went through every day; they was all feeding along within a hundred yards and never looked up.

“Q. When you put them in a car and bring an engine tooting up to the side of them, they are going to get scared, aren't they?

“A. Might get scared.

“Q. And getting scared they climb on top of each other, wont they?

“A. Not if loaded right, they wont.

“Q. What is to prevent them? How are you going to load them to keep them from climbing onto each other?

“A. They wont do it much if they are not loaded too loose. Of course, you can load them loose enough so they could, but if the cattle are loaded right, they wont.

“Q. How many do you load in a car then to load them tight enough to keep them from climbing onto

each other?

"A. About twenty five head.

"Q. About twenty five in a thirty six foot car, and they are tight enough so they can't climb on top of each other?

"A. Not bad.

"Q. Now, what were these? Thirty-six foot cars?

"A. I don't know. I suppose part of them was. That is what we ordered. Don't know what we got. I suppose part were thirty six foot.

"Q. You ordered thirty six foot cars?

"A. Always do. I suppose that is what Kidwell ordered. I suppose it is. I don't know what he ordered.

"Q. Do you know what capacity a 36-foot car has?

"A. No.

"Q. With average 1220 pound steers?

"A. No.

"Q. Well, horned cattle will injure each other more than muley, in transit, won't they?

"A. I should say they would, yes.

"Q. More dangerous to ship them, isn't it?

"A. Certainly.

"Q. If one of them gets down, something is going to happen? If one of them gets down, it is going to hook some of the others, isn't it?

"A. Not necessarily. Not always.

"Q. Are you able to say that this condition that you figured at American Falls was not caused by the inherent nature of the animals themselves?

"A. Question, please.

"Q., (Read).

"A. In regard to being skinned up?

"Q. Yes, and bruised?

"A. Yes.

"Q. Then I understand you to say that it is absolutely certain that you could ship this stock from Baker City to American Falls and they wouldn't be skinned up at all?

"A. They might be skinned up some.

"Q. Yes. Even under the best of circumstances?

A. They might be but their hips wouldn't be rubbed off and their tails, and they wouldn't be raw necessarily.

"Q. If one of these steers got down, the others might make him raw, wouldn't they?

"A. They might do it.

"Q. And if they got on top of each other and you weren't there with your prod pole, they might get crippled, mightn't they?

"A. They might.

"Q. Nobody could help that, could they?

"A. Not at that time, they couldn't. No.

"Q. And in all your shipments some of your stock gets down and gets hurt, doesn't it?

"A. Not all of them, no.

"Q. Pretty common occurrence in shipping sixteen cars of cattle fifteen hundred miles?

"A. I never shipped fifteen hundred miles before or since.

JAMES C. LONERGAN, being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:—

I am one of the parties interested in this shipment of cattle; I am in the livestock commission business here in Portland; have been in such business for about four years; prior to that time I was buying and selling cattle for different Sound brokers for ten years, and before that I was handling and shipping cattle to Chicago and different places—Montana; I have frequently shipped Oregon, or Idaho or western cattle a distance of fifteen hundred miles; I can't say how many now; I have shipped several from Ontario to Omaha years ago, and one shipment from Huntington; Ontario is about 75 or 80 miles from Baker City, I think, I am not sure; I saw these cattle a few days before they were shipped; one load I weighed at Huntington and shipped to Omaha shrunk seventy pounds in actual weight; the natural or normal shrink in a shipment from Baker City to Omaha if properly handled would be anywhere from 60 to 75 to 80 pounds; I saw these cattle out in the interior at a place called Emigrant where Mr. Trowbridge and I received them from the party that he bought them from, about, I guess, a month, maybe two months before they were shipped; they were a very good lot of cattle; there were seven hundred cattle run up and we picked out a little less than four hundred, perhaps four hundred of them; I saw them again three days before they were shipped; possibly it was longer than that; I am

not sure as to the exact days; I saw them at Haines; they were in good condition; would be classed as just ordinary beef cattle; I have purchased similar cattle in this same part of the country for a period in the neighborhood of fifteen years; from my experience as a stockman in the purchase of cattle I can guess pretty close to what these cattle would weigh; especially a big bunch; I am used to handling big bunches; I always do that when I buy when I aint got a place to weigh them, can't have them all weighed; I estimate what they will weigh by looking at them; it used to be customary to buy that way altogether, but of late years, they are inclined to sell them by actual weight; when I say I can guess pretty nearly their weight I mean that I can guess within 25 or thirty pounds of what they weigh, within that, per head, I mean; the last time that I saw these cattle, I would judge that they would weigh 1275 pounds; they were mostly four and five year olds, probably ten per cent or less of them were three year olds; they were just like the ordinary range cattle in this country; they wasn't what we would call wild cattle at all; in fact none of the cattle any more aint as wild as they used to be in days gone by; they were crosses of Hereford and Durham, just ordinary Oregon breed of cattle, with the predominant feature Durham blood in them, that is Durham blood—breed predominating; I know nothing about this shipment after it left Baker, personally; nothing only the returns I got.

Cross Examination.

"Q. Your approximation of 1275 pounds per head is pure guess, isn't it?

"A. Well, the weight I would estimate them if I were buying them.

"Q. Necessarily a guess though, isn't it?

"A. Well, everything is a guess, I suppose, when you don't weigh it.

"Q. You might miss it forty or fifty pounds a head?

"A. No. I don't think I ever did in my life, late years miss it that much.

"Q. Didn't you say you could come within 40 or 50 pounds per head?

"A. No. I didn't say it. I said I could come within 25 or 30 pounds.

"Q. Then you might miss it 25 or 30 pounds on these?

"A. Yes, I might possibly do that.

"Q. Now, you say that these weren't wild cattle?

"A. No, they were not.

"Q. But they were ordinary range cattle

"A. Ordinary range cattle, such as we buy here in this country.

"Q. But ordinary range cattle in eastern Oregon is pretty wild when led up to the side of a locomotive, aren't they?

"A. No, I don't think they are and I have handled lots of them.

"Q. They don't get scared?

"A. No. I have loaded thousands of them.

"Q. And they don't try to climb on top of each other when a locomotive comes along side?

"A. I don't know as I ever drove them up alongside a locomotive.

"Q. Your cattle car has to go up against a locomotive once in a while, when loaded? t

"A. After loaded?

"Q. Yes.

"A. Oh, yes.

"Q. When that happens the cattle pile right on top of each other, don't they?

"A. No, they don't because they don't generally have room to pile on top.

"Q. And they don't hook each other with those long horns?

"A. If loaded right they wont hook themselves very much."

JAMES G. KIDWELL, being recalled as a witness in his own behalf, testified as follows:

By a "feed in transit" rate is meant the right to stop the cattle while in shipment from the point of origin to their destination; stop them and feed while in route; in Oregon, I think, they allow you six months; in Idaho it is a little longer; I don't know just how much; I think they use the same form of a bill of lading any more than they make a notation; you have got to name the point where you want to stop and feed in transit; this notation is written on the bill of lading, I understand; there was no notation of

that kind written on either of the bills of lading which I got in this shipment; at the place where you stop, you can hold the bill of lading, or if you use any transportation, you have got to turn it in for your ticket for the return of your men, but they have bills numbering from one to as many cars as are shipped, and they give you a bill for each car; you can ship them out one or more up to the amount you ship at such times, under the time limit; and when you reship, you turn those back to the company; there was nothing of this kind done on either of those bills of lading; if the cattle had been shipped through right, it would not have been necessary to stop and feed at Valley; I paid upwards of three hundred dollars for feed there, somewhere—three hundred and forty—three hundred and thirty or forty; I thought I could make the cattle look better and get a little of the soreness out of them before I put them on the market.

“Q. Now, I wish you would explain—I don’t think that was made very clear—why it was you shipped these cattle out of Oregon in the first place. What was the idea?

“A. I shipped them to put them on feed in Idaho, for the purpose of shipping them on to the Eastern market—Missouri River,—Omaha.

“Q. When were you going to ship them to this eastern market?

“A. Well, that was speculative. I intended to leave them on feed, speculating on the possibility of a better market.

“Q. Now, when you unloaded these cattle at American Falls, and when you passed other points on this road, why didn't you—why didn't you take the cattle off and hold them until you got a better market at Omaha?

“A. The cattle were sore, bruised, drawn, and I thought if I left them, I would have to hold them too long. It would be five or six weeks before I could get them back on feed like they was when I started with them, or like they should have been with good treatment.

“Q. What proportion of the injury that these cattle sustained was the result directly or indirectly of the handling on this side of Granger, and what proportion of it was the result of handling on the other side—other side of Granger, east of Granger?

“A. Well, it is hard for me to determine the real damage that was done on the O. S. L.; the cattle were all in and knocked out when they arrived at Green River; they were badly knocked out when they arrived at American Falls; they got some heavy jams on the Union Pacific, and some little stations—some sidings. I never figured that there was over from five to ten per cent of the damage was done on the Union Pacific.”

Continuing this witness says:

When I say the “OSL” I mean the Oregon Short Line; I can't say exactly how long it took us to run from Granger to Green River, because we went through Granger in the night time; I don't remember

just when we went through Granger; it is thirty miles from Granger to Green River and we were travelling pretty fast, going twenty five—twenty or twenty five miles an hour at least.

Cross Examination.

“Q. Now, Mr. Kidwell, I have cross-examined you once on this, but it is necessary to do so again. You paid the through rate from Baker City to South Omaha, didn’t you? That is the rate you got?

“A. I didn’t pay it, no sir.

“Q. Well, now, you got a refund of over six hundred dollars?

“A. They refunded me.

“Q. Which was the through rate?

“A. Yes, sir.

“Q. From Baker City to South Omaha?

“A. Yes, sir.

“Q. So it doesn’t make any difference what the Feed in Transit rate was. You got the through rate?

“A. Refunded.

“Q. Now, do you know how long you are allowed to stop at a place like American Falls under the tariff?

“A. Where there is a feed in transit rate?

“Q. No, just ordinary stop?

“A. No, I don’t.

“Q. It is 120 hours, isn’t it?

“A. I don’t know exactly.

“Q. Well, isn’t that it?

“A. Well, if you were shipping through, I don’t

know how long they would allow you to stop. That would be kind of up to the railroad company generally is.

“Q. Isn’t that the argument you put up to them to get this refund?

“A. No.

“Q. That you had to stop over 120 hours?

“A. No, sir. I didn’t put it up that at all. I put it up—I told them in Omaha what Mr. Daugherty had told me in Baker City, the misunderstanding as to the regular tariff from Baker City to Omaha feed in transit. I had some talk of that kind in Baker; he told me it was a hundred and some dollars more than feed in transit, if I paid the local to American Falls, or a little more to Minidoka on to Omaha; and he had no—couldn’t find any place where there was any feed in transit rate at any other place.

“Q. He told you they would adjust it at destination, didn’t he?

“A. No, sir. He didn’t.

“Q. Didn’t?

“A. No, sir.

“Q. You know, as a matter of fact, that is the way they did, anyway?

“A. Adjusted at destination?

“Q. Yes?

“A. Sometimes they do. A great many times they don’t. More times they don’t than do.

“Q. But in a great majority of cases they do?

“A. Well, I aint found it that way.

"Q. Do you mean to tell this jury you put in a claim on every shipment for a refund?

"A. No. Never put in a claim in my life unless they paid it.

"Q. In the majority of cases they adjust it, don't they?

"A. Well, I never had any occasion—there is no agent can amend any contract. This is the only claim I ever put in they that I didn't get—this one to date—always settled."

Continuing, witness testified:—

Valley is about thirty miles from South Omaha; I won't be positive about that; it is not far; I might have been interested in a good many shipments that went in there in years back; this is the first one that I ever went through with; this is the first shipment; I do not know that all stockmen ship to Valley and fill their stock there; I don't know whether they do or do not; I have never tried to find out whether that is the practice or not; I know that it is the general practice of stockmen to run their cattle right into the market as quick as they can after they start—get them on the market; I stayed at Valley about an hour; the cattle stayed three days—four; in the three days at Valley, I didn't put any flesh on the cattle; just filled them up; got a little soreness out of them; made them look a little better; might have filled them up a little; that was the reason I stopped there; I paid three hundred and some dollars; I don't know how much I filled them up; don't know as I filled them any be-

cause it is hard to fill a steer when he is bruised and sore up, but I could rest them up and I wanted them to look a little better; yes, I filled them up again down in South Omaha the day I sold, had them filled; I went to Omaha the day I left Valley.

“Q. You went to Omaha to feel your market

“A. Went to South Omaha.

“Q. Left the cattle in Valley until the market came to where you wanted it?

“A. I left the cattle in Valley until Monday night and shipped them out.

“Q. You left them in Valley until the market went up to where you wanted it—where it should be?

“A. I don’t know as it went up. I wasn’t looking for it to go up in a day or two.

“Q. You weren’t looking for it to go down, were you?

“A. I don’t know.

“Q. As a matter of fact, that is the reason you kept this cattle at Valley, wasn’t it?

“A. No, it wasn’t. I told you what I left them there for.

“Q. You weren’t paying any attention to the markets in South Omaha?

“A. Oh, yes, all the time.

“Q. How is that?

“A. All the time, yes sir.

“Q. I believe you say now that you shipped your cattle down to Idaho for the purpose of feeding?

“A. Yes, sir, that is what we did.

"Q. And it was a matter of speculation how long you were going to leave them down there?

"A. It was.

"Q. Well, did you change your mind after you talked with Evans?

"A. No sir, I didn't talk to Evans at all.

"Q. When your men did then?

"A. Some of my men might have talked to him. Some of the men with me might have talked to him. I didn't.

"Q. Tell the jury why you changed your mind?

"A. Because these cattle were sore and bruised up and drawn in bad shape. I made up my mind, after talking with Mr. Trowbridge, that it would take us some little time to get them back on feed to where they was when—

"Q. Now, as a matter of fact—I beg your pardon, if you are not through, go ahead.

"A. We talked the matter over there and made up our minds the best thing to do was to run them into Omaha and sell them, and let some man who fed grain take care of them. It would take some time to get them in shape.

"Q. What was you talking with?

"A. Trowbridge—interested with me.

"Q. That is your partner in the shipment?

"A. Yes, sir. We both went out there for the purpose of coming back. He went that far. We was going to leave the cattle there on feed.

"Q. That man who testified here yesterady was

one of your partners too, wasn't he?

"A. Mr. Lonergan? Yes, sir.

"Q. As a matter of fact when you got down there you found a blizzard and feed very scarce and pasturage almost unobtainable, didn't you? Isn't that the reason you shipped to Omaha?

"A. No, I got lots of feed at six dollars per ton.

"Q. You say there was only one inch of snow down there?

"A. Something like that. Down at around American Falls.

"Q. Just one inch of snow?

"A. Might have been a little more, somewhere; just a little.

"Q. Now, how did you figure out that five or ten per cent of this damage occurred on the Union Pacific?

"A. I say it is hard for me to determine. I figure it out for the reason that the most damage was done on the O. S. L. between Huntington and American Falls, and American Falls and they call the station Kemmerer, where they jammed these cattle in taking 19½ hours run to Montpelier, side tracking and jamming all the way.

"Q. As I understand you have no real foundation; that is, just guess?

"A. It is hard for me to say just how much each jammed them. I can say I have the data of every siding where they stopped them every day or where jammed. Might not have jammed so many but in my

opinion they did.

"Q. That is what I say, it is just a guess on your part.

"A. Yes, a guess. I couldn't tell exactly but I wouldn't say over five or ten per cent—

"Q. You got a good run—

"A. At the most not over five or ten per cent.

"Q. You say you got a good run from Granger to Green River?

"A. Well, from the place where they loaded some coal and jammed around there for quite a little while, and I had kind of a row with the conductor, and he said he would run them cattle and give me a good run from there on, and without question he did.

"Q. He gave you a good run?

"A. Yes, he did; 25 miles an hour.

"Q. What was your row with the conductor about?

"A. Because of the way they were jamming the cattle; been jamming them all that night and all that day—all the way along up the river and around Montpelier, and from Pocatello from 11:30. I was getting pretty mad—pretty sore. That was the row we had.

"Q. How long was that train you got a good run on?

"A. I don't know; there was enough of them. Meaning the train going down.

"Q. Yes?

"A. I think a good train; good tonnage.

"Q. Wasn't overloaded?

"A. I don't know as it was. Made good time is all I know."

Redirect Examination.

Continuing, this witness testified:—

There was no blizzard at American Falls; little skiff of snow there is all there was; cattle run right out in pasture; lots of grass; put them in pasture first, and the man kicked about it and we fed them hay to save his pasture.

FRANK LACEY, called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:—

I am a stockman by occupation; have been in the stock business all my life; I have never done anything else; I have bought stock and shipped stock from Moscow, Idaho, Pomeroy, Heppner, Arlington, Pendleton, Baker City—pretty nearly every shipping point on the line, Oregon and Washington; the stock I bought in Idaho and Washington went to Chicago; I have shipped stock from Baker City and Huntington to Omaha, Kansas City and Denver over the Oregon Short Line; I don't know how many shipments I have made; quite a few; haven't shipped any East since 1904; I was here yesterday and heard the condition of these cattle described at Baker City; these cattle I shipped from Pomeroy and Uniontown went into Chicago shrinking sixty pounds; they were grain fed cattle hard cattle; the distance these cattle were shipped would be six or seven hundred miles further than from Baker City to Omaha; I shipped cattle into

Kansas City from Baker City and Pendleton and Hepner; they didn't shrink more than 70 or 75 pounds, grass cattle, in July and August; Kansas City is rather south of Omaha; I think Omaha is the closest; I aint certain as to that; I heard the condition of these cattle described when they reached American Falls; from my experience as a stockman I would judge it would take from 70 to 90 days with very good care to get them back to where they was when they started; if they are badly bruised and sore and crippled, some of them never would get back; in all my experience I ever had cattle are a whole lot better running than they are standing; the air circulate through the car for one thing; they are cooler; and when they stand, why, they get nervous and restless; it is a whole lot better for them to move along; I have bought lots of cattle by weight where we had no scales to weigh them.

Cross Examination.

On cross examination, this witness testified as follows:—

No, sir. I am not a commission merchant down at the stock yards; I am not a member of the firm of Hunt & Lacey; never had any connection with that outfit; I am a buyer, order buyer, down at the stock yards; I have never had any dealings with Mr. Kidwell; just bought stock in the yards from him, that is all; I have never had any misunderstanding with the railroads down there over the shipment of stock; never a dollar's worth; never put in a claim to none of

these companies, never a dollar; I know James Copeland of the O. R. & N.; he is the claim agent, the freight claim agent; I haven't shipped any cattle east since 1904; conditions have changed a great deal since then; we used to hold them on the train as long as we wanted to then; the railroads have taken out a great many curves and grades and have double tracked a great portion of that since then, I guess; they have put in the block signal system since 1904 on the whole line; the conditions in 1904 were entirely different from what they are now, but we got a whole lot better runs then than we do now; I know that; I will tell you the reason why; I shipped a train of sheep from Heppner, Oregon, to Fremont, Nebraska, and unloaded them once; that goes to show they were runnings some in them days; that was in 1897; how do I know, well, I tell you, you got to do your passing on one track, have one track, running two trains on one track now; business now twice as much as then; anyways only down in Nebraska getting to double track a little now.

"Q. Practically have a double track from here to Celilo, or Omaha?

"A. Not that I know of.

"Q. Practically have a double track every inch of the Union Pacific, don't they?

"A. I don't think so.

"Q. You don't know, do you?

"A. No, I don't know.

"Q. Then you are just jumping at conclusions

that they have too many trains for their tracks?

"A. I know the business is twice as much as it used to be then.

"Q. And for all you know the facilities are twice as much as then?

"A. You have bigger engines than then and they run slower.

"Q. Have bigger cars now than they did then?

"A. Yes, larger cars."

Continuing this witness says:—

I shipped some grain fed cattle from some place in Idaho to Chicago; they shrunk sixty pounds; that was the shrink in Chicago; I think we unloaded them about three times; we had our own hay, the company—that was in 1895, the spring of 1895, and the company furnished me a big furniture car, and I loaded my hay, the native hay that they had been eating and fed it right myself, and they don't do that now; they gave me the furniture car to take along; threw that in; I had a few hogs and I took grain for them; that shipment had extra^ordinarily good care; they had their own hay they had been used to eating; that is better than the usual care they get; grain fed cattle wont shrink near as much as other cattle; I have shipped grass cattle that only shrunk seventy pounds into Kansas City; that is late in the fall, you know, when they are pretty hard; they had been eating dry grass which is practically the same as hay; a grass fed animal will shrink a great deal more than a grain fed animal; a grass fed animal will not eat grain; it

takes some time to get them to it you know; alfalfa is not bad feed when they get used to it, just when they first start, if they are fed awhile on it they ain't so bad as when first put on it; of course, they shrink more on alfalfa than they would on wild hay; there would be some difference between an alfalfa fed animal and a grass fed animal; a little bit in favor of the alfalfa; in shipping from Eastern Oregon to Portland, I buy on a four per cent shrink, if I can; if I can't and want the cattle, and want the cattle, I take them the other way; they shouldn't shrink very much in addition to the four per cent, from thirty to sixty pounds, probably; I have seen them shrink a whole lot more than that; all according to the conditions when they are weighed, you know, but the average shouldn't be more than that, I shouldn't think; I say the average shrink; that would be about the average shrink, from forty to sixty pounds, including the four per cent; about sixty, sometimes shrink eighty pounds; I have seen them shrink eighty; this was beef cattle; a beef steer would shrink a little more than a feeder, I think it would, no, it wouldn't, there wouldn't be much difference, about the same; I have shipped from all the points on the O. R. & N. from Eastern Oregon to Portland; I have not shipped any lately; haven't shipped any for four or five years; haven't shipped any from Heppner lately; have shipped lots from Heppner; I think Heppner is about one hundred and eighty miles from Portland; we would get good runs, then we would get awful bad ones; the ordinary run from

Heppner is about twenty four hours; it takes twenty four hours alright; cattle shipped approximately two hundred miles on the train 24 hours will shrink between thirty and eighty pounds, or forty and eighty pounds.

Redirect Examination.

Continuing, on redirect examination, the witness testifies:

In a shipment of cattle, the greatest shrinkage occurs on the first shipment, the first unloading; I always found on the first shipment that they shrunk the most and they kind of get on their feed after they are shipped; get hungry you know and drink and eat.

JOE LONERGAN, being called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:—

I am a brother of James Lonergan who testified here yesterday; and who is interested in these cattle; I am foreman of the Union Stock Yards' horse barn; have been for a year and a little over two months; prior to that time I was shipping cattle for Kidwell and Caswell and J. C. Lonergan Company; have been connected with cattle—in the cattle business since 1881; I accompanied this shipment of cattle from Baker City to Omaha; we left Baker City, sixteen cars of cattle on December 3rd, 1909, along about—I didn't keep track of the time at all, Mr. Kidwell kept track of it, I think it was along about nine o'clock; around nine o'clock somewhere; we left Baker City on December third, 1909, as I said before, and we ar-

rived in Huntington around two o'clock the next morning, 2 a. m., and between Baker City and Huntington we were side tracked some; from Huntington on, we stopped on side tracks to let other trains pass, and some places quite a while, and the cattle in some places—we would do switching at Ontario, I think, and Nampa, they done some switching there, and they jammed them up in switching the cars in and out, and bumped other cars agin the cattle cars; when I was on this—lots of times on this—in this shipment I objected to them switching stock cars, but they said they had to do it sometimes; I objected to the railroad company switching the stock cars at those points where they were switching cattle—the stock cars around—switching them in and out—kicking them in and out as the railroad men call it; that is what they call switching cars; we arrived at Glenns Ferry; we stopped there about an hour or so, and then went on out of Glenns Ferry; we stopped a long time at—out near the end of the switch some place at the foot of Kings Hill; they was switching cars there and they was jamming the cattle a good deal, and they set out, I think, two cars there, one or two cars there; they had a heavy train; I asked the hind brakeman what was the matter and he said that they had too heavy a train; they said that the reason they couldn't make good time was because the train was too large, and they had to set out these cars and then they went over Kings Hill, and they side tracked two or three other places; it was night-dark; I

he got up; I saw him getting up; he got right in behind the caboose and trotted along the track and tried to keep up with us for quite a ways, half a mile or so; he found he couldn't keep up, the train kept going faster, he couldn't keep up, his wind gave out, and he stood right about crossways of the track; he held his head up pretty high and throwed his tail, like as if he was going across the prairie but the snow was too deep, I guess, for him, so he went back on the track the way we came, and I heard after that that the passenger that passed us about a mile down the track—(Witness interrupted); why, at Medicine Bow there, they stopped there to let a train pass, and I can't remember whether they sided or not; anyhow, there was a train passed there, and the engineer, in handling the air, he threw on the air too hard and threw the train together, and knocked us all off our seats in the caboose and broke this door, and piled up several cattle in that car—bruised up several cattle in that one car—in fact seven or eight cars; it shook them up pretty badly, I found out afterwards; the run from North Platte to Omaha was good; we had a good run; made good time; these cattle were fed at American Falls, Green River, Laramie, North Platte, and at Valley; I was there; they were well fed, and they were well taken care of at all these places; before we arrivd at Glenns Ferry, somewhere on the road, I can't remember just where it is, but there was a good deal of bumping of cars where they were handling, because of the air, the engineer not understanding the air; during

this trip if any of these cattle got down, I poked them up with the best I could and got them on their feet; all the way through made it a point to keep these cattle on their feet the best we could; some places they were harder to get up than others; they were footsore, and when they got down around between Shoshone and Glens Ferry they got pretty footsore, they had been shook up so much in the car; it seemed to me as if they was about 140 or 150 pounds less weight per head when they got to American Falls than when they left Baker; their condition was very bad when they got to American Falls; they was damp and footsore and was bruised up; I was at Baker when they were loaded; they were in fine condition there; their condition when they got to Omaha was good; was fed well at Valley.

Cross Examination.

On cross examination, this witness testified as follows:—

Yes, sir, I am a brother of the Mr. Lonergan who is one of the partners interested in this shipment; by reason of that fact I am not any more interested in this shipment than I would be for any one else—any friends of mine—I do not take any more interest in my brother's case than I would in anyone else's—any friend's of mine, anyone I worked for, anybody else I worked for; if I was working for anybody else I would take just as much interest; I did not work for Mr. Kidwell a great many years; I worked for Mr.

Kidwell a very short time; Mr. Kidwell and I are very close friends; I have known Mr. Kidwell for several years, but I haven't worked for him but a short time; my brother is not now a partner with Mr. Kidwell; I did not help to drive the cattle from Haines to Baker; I was at Haines; I intended to help drive the cattle from there, but I was sick that morning and went up on the train and went back with a saddle horse about a mile outside of Baker, started to help bring them in from there.

"Q. Now, after you left Huntington, you side tracked a good deal to let passenger trains by, didn't you, which were routed over the northern route on account of a washout?

"A. I don't know. I don't remember any washout. Might have been somewhere but these trains I know were let pass; I know we let lots of trains pass us.

"Q. An unusually large number of trains there, wasn't there?

"A. Yes, some places.

"Q. Well, most of the places, wasn't there, between Huntington and American Falls?

A. Yes, most of them big sidings.

"Q. And it is always the custom to side track a freight train for a passenger, isn't it?

"A. Yes—no, not a stock train; they side track—I have known them to sidetrack passenger trains that didn't carry mail for stock trains.

"Q. Where did you know that to happen?

"A. I know that to happen on the Short Line.

"Q. How long ago?

"A. A year ago this last winter.

"Q. What point was that?

"A. Well, I can't remember the point they side tracked there.

"Q. Did you ever know of another case of that being done?

"A. Oh, I have heard of cases of that kind.

"Q. Well, I want to know what you know about it?

"A. Well, that is all I know, what I heard about it. And I know of this one. That is all I know of.

"Q. Well, does a stockman ordinarily expect a passenger train to take a siding for him?

"A. No, sir.

"Q. It isn't the custom then?

"A. No. It is all on account of getting the stock in, probably on time. Passenger trains that is not carrying mail can be side tracked in cases of that kind; I suppose that is why that was done.

"Q. Well, all those through trains on the Short Line carry mail, don't they?

"A. Some of them don't.

"Q. Which one now?

"Q. Which one now? Which through train doesn't carry mail?

"A. Well, number five, they tell me, don't carry mail or didn't use to.

"Q. How long ago was that when five didn't carry mail?

"A. A year ago last winter.

"Q. How big a train did you have from Huntington to American Falls? Approximately how many cars, about?

"A. I don't know.

"Q. Well, you know whether you had ten or fifteen, don't you?

"A. I know how many cars of stock but I don't know how many cars they hung on.

"Q. Well, let's put it another way; was it a long train or a short train?

"A. It was a long train.

"Q. When you say a long train what do you mean?

"A. It might have been thirty cars or more or less.

"Q. Thirty or more cars then, on an average, in that train?

"A. Yes, sir.

"Q. You think. Now, there is a good deal of slack in a train isn't there when you stop it and start it?

"A. Yes sir.

"Q. And even if you start a train as easy as you can, it is going to make a bump on the rear end, isn't it—the caboose?

"A. No sir. No sir.

"Q. Now, explain to the jury how you can start a long freight train and not make a bump when you take out the slack.

"A. Well, just through their engine. I have seen

them many a time start their engine—start a long train—a man start a long train of cars of sixty cars just as easy as they would start a passenger train of eight or nine cars.

“Q. Where was the engineer?

“A. Over the Northern Pacific going down the hill from Stampede to Sisters.

“Q. That is with no slack in the train, when going down hill because the cars are all together?

“A. Yes, slack in the train.

“Q. How do you get slack in the train on the down grade?

“A. Why, when they left off the air they slack up and then go ahead again.

“Q. Well, when they let off the air, the train will run by its own momentum, don't it?

“A. What is that?

“Q. A car will run down the hill when you take off the brake, won't it?

“A. Yes, but some engineers taking a train down that hill, I know of, broke the train in two 32 times between there and Oroville.

“Q. That was over in the Stampede Tunnel country?

“A. Yes.

“Q. That is on a 4 per cent grade, isn't it?

“A. At Stampede?

“Q. Yes.

“A. I think so.

“Q. And that is just about as steep a grade as any

railroad operates over in the country?

"A. I think so.

"Q. So those conditions don't obtain up here on the Short Line at all, do they?

"A. Yes, sir.

"Q. Where is there a four per cent grade on the Short Line?

"A. I don't know about a four per cent grade, but they knock drawheads out of a stock train. I have known them to, and bumping cars a good deal.

"Q. They do that on every railroad in the country, don't they?

"A. Yes, sir.

"Q. Now, I believe you said the engineer didn't handle his air properly down there at one of these points. How do you know he didn't?

"A. I could tell by the way the train was handled, or by the way the cars came together.

"Q. How do you know but what somebody else ran into that train?

"A. I know there wasn't anybody else ran into it.

"Q. You know they wasn't switching up ahead there?

"A. Well, no one else only their own engine.

"Q. Are you an expert on air brakes?

"A. No sir, but I know when they turn on the air suddenly that it causes a jump.

"Q. Are you familiar with the New York Air Brake they use up there?

"A. No. I been with the engineer a good many

times and the engineer gave me a good many pointers on it.

"Q. What kind of an air brake is used up there?

"A. I don't know, don't remember. He didn't tell me what kind there were; I never asked that; a number of them.

"Q. You know so much about air brakes, you know the very best air brake will stick sometimes without any apparent cause, don't you?

"A. Yes, sir.

"Q. So it will stick when really not the fault of anybody?

"A. It will stick when there is cause for it, too, so they tell me.

"Q. Well, how about the brakes under the cars? Don't they stick sometimes?

"A. Yes, sir.

"Q. Nobody to blame for it—no apparent reason is there?

"A. Sometimes they freeze up.

"Q. Yes. Sometimes they get dirty inside the cylinder. A good many different things may cause them to stick?

"A. Certainly.

"Q. Now, when you got down to Shoshone and were talking about this yard, who did you talk to?

"A. I didn't do any particular talking about this yard. Mr. Kidwell and Mr. Trowbridge did the talking with these railroad people at Shoshone.

"Q. Oh, well, you don't know anything about it

then?

"A. Yes, sir, I talked with one man there; he talked to me about the yard.

"Q. Who was you talking with?

"A. I don't know his name. He is the yardmaster of that short line that runs up to Hailey.

"Q. Name Kimball?

"A. I don't know his name. He didn't tell me his name and I didn't ask him.

"Q. What did he have to do with the yard?

"A. I don't know, but he said that yard wasn't large enough to hold half them cattle.

"Q. Who had charge of the yard at that station?

"A. I don't know.

"Q. You didn't try to find out, did you?

"A. Well, sir, I was just along there to take care of the cattle and Mr. Kidwell and Mr. Trowbridge did the business with the railroad company.

"Q. Well, if you wanted to say anything about the yard at a station, who would you ordinarily go to?

"A. Go to the agent.

"Q. Well, did you say anything to the agent down there about this yard?

"A. What is that?

"Q. Did you say anything to the agent there about this yard?

"A. I didn't, no sir.

"Q. Then you don't know whether it was too small or not, do you?

"A. I could tell by the looks of them.

"Q. Now, how big were they?

"A. I don't know exactly how big they were. I didn't measure the yards or anything of that kind, but they didn't look to me as if they were big enough to hold more than 150 head, and then couldn't feed them in there.

"Q. About how big did they look to you then?

"A. About 125 feet across them.

"Q. About 125 feet by what, how wide?

"A. Oh, I suppose about 75 feet.

"Q. Seventy five feet?

"A. I don't know. Might be wider than that but I suppose that wide.

"Q. Now, how big were those cars you were shipping in?

"A. Thirty six feet long.

"Q. And how wide?

"A. They were eight feet and something.

"Q. Eight feet six?

"A. Eight feet six probably.

"Q. You had sixteen cars?

"A. Yes, sir.

"Q. As a matter of fact you know that that yard down there in 1909 would hold 20 cars of cattle?

"A. At Shoshone?

"Q. Yes, at Shoshone.

"A. In 1909?

"Q. Yes, in 1909. Don't you know the published capacity of that yard is twenty cars of cattle?

"A. I didn't know.

"Q. You didn't try to find out. You didn't try to find out, did you, what was there, did you?

"A. Well, sir, I didn't try to find out because they told me—the trainmen there told me, the yard men, whoever they were—told me the yards were too small to hold that amount of cattle.

"Q. Well, you didn't ask anybody that knew anything about it, did you?

"A. I don't know. I suppose these men knew about the yards.

"Q. Now, how many little pens was there in that yard?

"A. Well, there was one that I know of.

"Q. There was one little pen at the chute?

"A. One little pen besides the chutes.

"Q. How many chutes were there?

"A. Well, I don't remember now, there wasn't over two, I don't think.

"Q. And there was only one little unloading pen, is that what you say?

"A. Well, there was—I don't remember whether there was two chutes or one.

"Q. And how big was the cutting out pen there?

"A. Well, I couldn't say.

"Q. Do you know whether they had one or not?

"A. They had two pens there.

"Q. They had two pens. How big was the feed yard, do you know?

"A. I suppose 125 feet across it.

"Q. One hundred twenty five feet by seventy five?

"A. What?

"Q. You say the feed yard proper was 125x75—is that right?

"A. Well, I suppose that is what it is.

"Q. And how big were the unloading pens at the chutes?

"A. How is that?

"Q. How big were the little pens at the foot of the chutes?

"A. I don't know. I never measured them. I don't know.

"Q. Well, can't you give us an estimate?

"A. No, sir.

"Q. How big was the cutting out pen?

"A. I don't know.

"Q. So you don't know anything about this yard, do you?

"A. No, sir. I don't know much about them.

"Q. That is what I thought. That is the only reason you wouldn't unload there—because the yard wasn't big enough?

"A. Yes, sir.

"Q. I believe you said, Mr. Lonergan, it was cold and snowy when you got down to American Falls?

"A. No, sir.

"Q. You didn't. Well, I misunderstood you then. What did you say?

"A. I said it was fair weather there; was a little cold; not bad.

"Q. And no snow?

"A. A little snow, I said, but not very much.

"Q. I understood you to say it was nowing and raining the night you got there?

"A. No, sir.

"Q. I am mistaken about that, am I?

"A. Yes, sir.

"Q. Now, when you got down to Kemmerer, they set in some coal, I believe, you said? Set in some coal cars?

"A. Yes, sir.

"Q. Do you know why?

"A. No, sir.

"Q. Well, as a matter of fact, you know they were having a coal famine in the East, don't you?

"A. I didn't know it at the time but I knew it after I got to Cheyenne.

"Q. You know it now, don't you?

"A. Yes, sir.

"Q. They were doing all they could to get these cars east then. That is right, isn't it? Where was it this steer fell out of the car that you are talking about?

"A. At near Medicine Bow.

"Q. Medicine Bow?

"A. I think that is the name of the place.

"Q. How far is that from American Falls?

"A. I don't know exactly.

"Q. And what date was that? Well, how many days was that after you left American Falls; one, two, three, I don't want the exact time?

"A. I am not sure whether it was the eleventh or twelfth. I think it was on the eleventh—twelfth I think it was.

"Q. You think that was on the twelfth, you mean December 12th, do you?

"A. December twelfth.

"Q. Now, where were they switching after they left Medicine Bow? Where was this switching you talk about so long in there by Medicine Bow?

"A. Yes, sir.

"Q. Where was it?

"A. Where was it?

"Q. Yes.

"A. There was a siding near by there.

"Q. And what were you going into the siding for?

"A. I don't know as we went into the siding. I don't know as we did any switching there. I didn't say so. I said passed a train there and in starting the train—in handling the air there, they bumped these cars together.

"Q. So they wasn't switching there at that point?

"A. I don't know. I don't remember whether switching. I know we passed a train there.

"Q. Don't you know they have got a double track from Medicine Bow in?

"A. I didn't know at the time if they had. I didn't see any double track. I saw sidings along different places.

"Q. Now, I believe you said from American Falls

into Omaha you had a good run?

"A. Yes, sir.

"Q. I believe you said there was some bumping just before you got into Glenns Ferry.

"A. Yes, sir. Out of Glenns Ferry a ways.

"Q. How much of a grade was that?

"A. I don't know anything about it.

"Q. You had a pusher up there, didn't you?

"A. We went down a grade there, I know, fourteen miles outside of Glenns Ferry—into Glenns Ferry, there is a grade there.

"Q. Well, did you go up a grade near King Hill?

"A. At King Hill?

"Q. Yes?

"A. From Glenns Ferry?

"Q. Yes?

"A. Yes, sir.

"Q. How much of a grade is that?

"A. I couldn't tell, I have heard but forgotten.

"Q. Pretty steep, wasn't it?

"A. Yes, sir.

"Q. And it took a pusher to get up there, didn't it?

"A. I don't remember whether a pusher going up there or not.

"Q. When you have a pusher on it runs up the slack pretty lively, to get up those hills?

"A. There isn't much slack in a train going up hill when a pusher is on.

"Q. When it runs in the slack, I am talking about?

"A. I never noticed any slack.

"Q. I am talking about when you start there. There is slack in the train when you start up the grade, isn't there—you say you don't know?

"A. Well, I have never noticed any that night.

"Q. Now, as I understand your direct examination, you go along for the purpose of getting out at these different places and poking the cattle with your prod pole, and getting them up on their feet?

"A. Yes, sir.

"Q. And you had three men along for that purpose, didn't you—yourself and two other men?

"A. Mr. Kidwell and Mr. Trowbridge.

"Q. And that was the reason the three went along, wasn't it?

"A. Yes, sir.

"Q. And it is a very common occurrence for the cattle to get down, isn't it?

"A. Very common?

"Q. Yes?

"A. Well, they should ride right; ride all right when the train is moving; they don't get down. When the train is standing on a siding, then is when the cattle will fret and get down—get excited.

"Q. Every time you stop you go and look the cattle over?

"A. Every time I have the time, I always ask the conductor if I have time to go over, and if he says no, I stay in the caboose.

"Q. That is the reason you look them over. You are afraid some of them are down?

"A. Yes, sir.

"Q. You carry a long pole for the express purpose of jabbing them and making them get up?

"A. Yes, sir.

"Q. Now, any cattle get footsore when they are on the train a few days, don't they?

"A. Yes, without feed or water.

"Q. It doesn't make any difference whether they get food or water or not, does it?

"A. Yes, sir.

"Q. How does that affect their feet?

"A. What is that?

"Q. How does that affect their feet?

"A. Their feet?

"Q. Yes?

"A. Why, it wears them out. They have nothing in their stomachs to hold them up on their feet.

"Q. That gives them sore feet, does it?

"A. Yes, sir, makes them footsore—foot tired.

"Q. I believe you said you thought these cattle shrunk about 150 pounds at American Falls from their original weight?

"A. Yes, sir.

"Q. Didn't they shrink more than that?

"A. Well, they might have. They shrunk all of that anyway.

"Q. Mighten't they shrunk two hundred pounds there?

"A. I know they shrunk all of that.

"Q. All of two hundred?

"A. No, sir, 140 or 150 pounds.

"Q. All of 140 or 150 pounds?

"A. Yes, sir.

"Q. Was that all loss in weight?

"A. Yes, sir.

"Q. That was a loss of flesh, was it?

"A. Yes, sir.

"Q. I believe you stated on direct, Mr. Lonergan, that the cattle were in good condition when they got to South Omaha?

"A. Well, they were well filled up.

"Q. Well filled up?

"A. Yes, sir.

"Q. Good condition?

"A. They were as full—they were well filled as they could be. They were fed at Valley.

"Q. That is what you always stop at Valley for, isn't it?

"A. Stop there to rest the cattle.

"Q. Rest them and feed them?

"A. Yes, sir.

"Q. So you can put them on the market?

"A. Yes, sir.

"Q. Looking pretty good?

"A. Yes, sir, that is the idea.

"Q. And that is the common practice, isn't it?

"A. Yes, sir."

JOHN L. BURK, being called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:—

I reside at Portland; am engaged in the livestock commission business, and have been so engaged for nearly four years; I have shipped stock and been with stock that have been shipped about a thousand miles; have never shipped stock as much as fifteen hundred miles, but I have been with shipments that long; a bunch of steers weighing about 1250 pounds or thereabouts in good condition when shipped, would under ordinary treatment on a trip of fifteen hundred miles if they were well taken care of, shrink around eighty pounds—seventy five or eighty pounds; the effect of standing cattle in cars when the train is not in motion, well, from my experience, I would rather have cattle travelling ten hours than to have them standing five; if they are standing on a side track, they are jumping around and fighting—dropping down.

Cross Examination.

On cross examination, this witness testified as follows:

I don't know as ordinary milk cows would fight each other standing as much as wild range stock; there might be some difference; there would be some difference if the cattle were horned or muley; I think; they could do themselves more harm; it is absolutely necessary in shipping stock to have them stand on the side track at times, so that passenger trains can pass.

Redirect Examination.

On redirect examination, this witness testified:—

Most of the western cattle are horned cattle; in some sections they have horned cattle and in other sections of the country, why, they have muleys; nothing uncommon about shipping horned cattle.

FRANK W. BURK, being called as a witness on behalf of plaintiff and being first duly sworn, testified as follows:—

I reside at Portland; I am engaged in buying and selling cattle in the country and shipping to the Portland Stock Yards; I have been so engaged since there has been a stock yard in Portland, at this market, I have been engaged in the cattle business all my life; I have had experience in shipping cattle from Utah points, Idaho points and Wyoming points over the Oregon Short Line railroad; most of the shipments I have made from Utah have been made from Logan, Utah—Richmond, Utah; and I shipped these cattle to Portland Union Stock Yards in this city; I shipped them all to the Portland Union Stock Yards; well, I loaded the cattle at Logan, Utah, and we would run from there through Pocatello, Idaho; from Pocatello, Idaho, to Glens Ferry, and through Glens Ferry to Huntington without feed or water; and we would run from Huntington, Oregon, in all cases with the exception of one, to my recollection, in about 35 different shipments that I have in mind without unloading but once that I remember of; in other words, that would make two thirty-six hour runs, and in each case that would be within the limit, to Portland, Oregon; the average shrink per head on these cattle be-

tween these points and Portland, I would estimate to run between, on the cattle that I have handled, between forty and fifty pounds, at Portland, Oregon; I have shipped cattle from Idaho points to Omaha and Chicago.

"Q. Now, what would be your estimate on a shipment of steers of the average weight of about 1250 or 1260 pounds, range cattle taken from eastern Oregon range, and fed upon hay for sometime before shipment? What would be your estimate on the natural and usual shrinkage of such a shipment of cattle from Baker City, Oregon, to Omaha, Nebraska, if they received proper and usual treatment in that transportation?

"A. Around seventy to seventy five pounds."

Cross Examination.

On cross examination, this witness testified:—

I live at Twenty second and Broadway, Portland, Oregon; I have been a commission man at the Portland Stock Yards; I am not now; I am not connected with any of those commission firms down there at the stock yards; I was at one time connected with the Burk Commission Company and the Lonergan Company; Mr. Lonergan is one of the parties interested in this shipment; I am not interested in these cattle; I was in partnership with Mr. Lonergan in the commission business; sold the cattle to the stock yards on commission; I buy almost exclusively for the Portland market now; have been for the last three years,

three or four years, since this stock yard has been here; it has probably been twelve years since I shipped any stock to Omaha; circumstances and conditions surrounding the shipment of stock to Omaha are much better now than they were then; the railroad company at present are doing everything that I know of that—the railroad handling them are making an effort probably to get the shipments here without fail; handle them here in a better way; the only time I had a stock special was from Logan, Utah, in here; there is a stock special, I understand, coming this way, twice a week; I don't think they have a stock special on the Oregon Short Line; I should think the circumstances surrounding the shipments twelve years ago would be no criterion for shipments now; the same effort twelve years ago, and the same effort on the part of the company today would bring the same result; there is more traffic handling—more traffic, possibly, now than twelve years ago; I don't just exactly understand your question; I have not shipped any cattle to South Omaha within the last twelve years; I have shipped cattle from Logan, Utah, here every winter and every spring for the last three years; as to whether it is preferable to run stock 36 hours rather than 28 hours, depends upon the places you have to feed and water them in transit between the place you load them and the place you would be compelled to unload them; generally speaking I think stockmen differ as to whether it is preferable to run stock 36 hours or 28 hours without unloading for feed

and water; I would rather have cattle run 36 hours, provided they are moving all the time; it is generally the custom to run cattle 36 hours, where you can; you usually sign a release, provided you can get a good place to feed them at the end of the 36-hour run; sometimes, mostly, we buy cattle on a four per cent shrink; I have shipped grass fed cattle into this market; as to whether or not they shrink more than dry fed cattle depends on the circumstances under which you receive them; sometimes they do more and sometimes they do not; some cattle shrink more than others; it depends upon the character of the way the cattle are handled in transit; depends on the way the buyer receives the cattle, that buys them, and the feed that they would happen to get at the market they were turned over; I would say that there might be a little greater shrinkage under the same circumstances on grass fed cattle than on hay fed cattle; when I estimate the shrink of forty or fifty pounds, I made that as an average shrink on all the cattle I have handled in Portland to the best of my judgment, including the grass cattle with the fed cattle; I shipped these cattle about a thousand miles; and some of them greater distances; some from Green River, Wyoming, to Portland; I fed them in transit not to exceed twice that I remember of.

“Q. Would it make any difference in the shrink, Mr. Burk, if you took these cattle out at the feeding pen, and found the feed very scarce and very high, and put them in pasture where you had a couple of

inches of snow? Would that make any difference in the shrinkage?

"A. What time of the year?

"Q. December?

"A. Depends on the time that you might leave them there.

"Q. Suppose you left them there about four days?

"A. Without any feed?

"Q. Oh, no. Feed them some hay and some grass in the pasture for instance?

"A. Well, that would altogether depend on the condition of the cattle when they got there.

"Q. Yes, that is just the point. So that when you estimate the shrink, it depends entirely upon the conditions and the circumstances surrounding the shipment, doesn't it?

"A. I was asked the question as to how I would estimate the shrink. I estimated the shrink at 75 pounds a head from Baker City to Omaha; that cattle could be ordinarily and usually handled at 75 pounds shrink.

"Q. Yes, I know that and I know the answer, but I asked another question. It depends entirely upon the circumstances and conditions surrounding the shipment, doesn't it?

"A. Yes.

"Q. And it depends entirely on the character of the cattle, and the character of the care and the feed they get?

"A. And the handling of the cattle by the railroad

company in transit.

"Q. And by the man in charge too?

"A. Yes.

"Q. So, if the man in charge doesn't give them proper care, they will shrink more than if they had proper care, wouldn't they?

"A. The man in charge cannot give them proper care without the co-operation of the railroad company.

"Q. But suppose that he didn't?

"A. The man in charge ordinarily has nothing to do with the care of the cattle, while they are in transit on the cars; they provide the feeding places for them, and he always gives them the best care at the feeding places for the reason that it is to his advantage to do so.

"Q. Suppose the car stopped at the feeding place, and he wont unload, what is the railroad company going to do?

"A. For what reason wont he unload?

"Q. For reasons best known to himself. I don't know why.

"A. I would have to have his reasons before I could answer that question.

"Q. Suppose he arrives at the feeding point and says he wont unload because feed is very high and very, and he wants to be taken on to another point?

"A. If he arrived at a feeding point and he had ample space, ample room in the corrals to unload his cattle, and had ample hay in the corral or could get it

there to feed them with, and he had ample water in there to feed these cattle, and they had run the cattle long enough time to unload them, in my judgment, he should unload.

“Q. And if he didn’t he wouldn’t be giving proper attention?

“A. That would be my judgment.

“Q. Now, I believe you estimated the shrink on the same cattle moving from Baker City to Omaha?

“A. No, I did not. They asked me, I believe, what I would estimate the shrink of a bunch of cattle from Baker City to Omaha.

“Q. That was the purest kind of guess on your part, wasn’t it?

“A. No, sir—an estimate, not a guess.

“Q. What is the distinction between an estimate and a guess?

“A. An estimate, I would think, would be a conclusion arrived at by a man that knows something about his business, where a guess would count for nothing.

“Q. I see. This is an estimate you are making?

“A. Yes, sir.

“Q. On a shipment of cattle?

“A. I am answering—making estimates, yes, sir.

“Q. Over a road that you have never shipped over?

“A. Yes, sir.

“Q. You don’t know anything about this shipment in question, do you?

"A. What do you mean by that?

"Q. You didn't see these cattle, did you, that were shipped?

"A. I saw these cattle that were shipped.

"Q. Where?

"A. I saw them at American Falls.

"Q. At what time?

"A. About the time—I don't know about what time; at the time that they were there.

"Q. Yes. You didn't see them at Baker City, though, before they were loaded, did you?

"A. No, sir.

"Q. So you don't know anything about their relative condition at Baker City and American Falls, do you?

"A. No, sir.

Redirect Examination.

Continuing, witness testified:—

I saw these cattle at American Falls as they were loading them out; the cattle at that time looked to me to be drawn and in a drawn, hollow condition; I had no chance to observe whether or not the cattle were lame and sore; they were putting the cattle in the corral at the time I was there.

"Q. Now, you were asked about the effect it would have on a bunch of cattle if they were turned into a pasture covered with snow in the winter time, I will ask if the effect would be different if that pasture contained good grass and the cattle were fed all the hay they could eat while they were there.

"A. I would say that it would in no way damage the cattle.

"Q. You were asked concerning the duty of the shipper or the attendant of the shipment of cattle to unload at a given point, and they were able to unload. Suppose that the stock yard or corral at that point was not large enough to accommodate to exceed one-third or one-half of these cattle, and there was no water in the stock yard; no feed to be had in the town; what would you say with reference to the duty of the shipper under those conditions?

"A. Under those conditions, I would say that the shipper would refuse to unload the cattle and insist on going to a point in route where he could get ample yardage room and feed and water for the stock."

Continuing, this witness testified:

Why, it would take we ordinarily figure that it would take about, to let the cattle stand up to a rack it would take twenty three inches to the steer, where they put in feed racks to feed them; if there are no feed racks, it is almost impossible for any of the cattle to get the hay for the reason that they would tramp it into the ground; to feed, rest and water three hundred and ninety six head of cattle I would say that it would take a little more than 23 inches, but it would take additional water space to the 23 inches to the steer, provided there was a rack in front of each steer; in reference to the relative effect of letting the cattle stand in the cars after being loaded and running, I will say that the cattle are always in better condition;

they always stand up better, pile less and it is always to the best advantage of the shipper to have the train in movement, in other words to have the train moving; the minute the train stops the cattle begin to hook around or begin to move around; cattle get down when they are standing, where they will not—when the train is standing,—why they ordinarily wont get down when the train is running; for myself, I would prefer to have the cattle—I would prefer to have them run twelve hours longer than to have them stand five hours on a sidetrack; I think there is, if any, a very slight difference in the shrinkage of horned and muley cattle in transportation; these cattle which I have testified to shipping and upon which I base my opinion as to the amount of shrinkage were mixed horned and muley.

Recross Examination.

“Q. Now, Mr. Burk, speaking about this hypothetical corral again, where they refused to unload. Suppose the capacity of that was twenty cars, and a man had sixteen cars, would there be any excuse for him not unloading there on account of the size of the corral?

“A. That would depend altogether on how you would arrive at the capacity of the corral.

“Q. I am supposing that we have already arrived at that?

“A. I mean would be different. Sometimes you might be able to put twenty cars of cattle in a corral, but you might be able to get them into the corral, and

at the same time it would be utterly impossible to feed and water these cattle in the corral, even though they were there.

“Q. Well, suppose the regular capacity of the corral, stated by everybody, was twenty cars.

“A. Then what about it—what is the balance?

“Q. Would there be any excuse for not unloading on account of the size of the corral.

“A. I think that would be decided—that would be up to the man in charge of the cattle.

“Q. You think he would have a right to refuse to unload?

“A. Yes.

“Q. In a corral having a capacity for twenty cars and he had sixteen cars, because the corral was not big enough?

“A. Yes. If in his judgment the corral was not big enough; furthermore if the corrals had no water troughs in there and didn't have any hay.

“Q. Now, did I understand you correctly to say that it is impossible to feed the cattle on the ground in the corral, or do you mean it is just less desirable?

“A. Why, I don't mean to say it would be impossible to put hay out on the ground to them.

“Q. Well, isn't that the method in which they feed all the cattle when they are wintering them around through the country at different places? Feed them on the ground?

“A. The method of feeding beef cattle in the country, the method certainly is feeding on racks.

"Q. How about range stock?

"A. Range stock they feed on the ground, but they trail the hay out for a long distance, where the cattle can all get at it.

"Q. Not much of that hay tramped in the ground, is it?

"A. If muddy and the cattle were running over it, it would be tramped in the ground.

"Q. Suppose the ground was frozen and snow on the ground?

"A. If it was dry, and if for any reason the cattle didn't run on the hay they probably wouldn't tramp it in the ground.

"Q. The man in charge when he goes with the cattle usually rides in the caboose, doesn't he?

"A. No, sir—for instance in some cases I have ridden on the caboose, and then get off and get on the train ahead and try to arrange for feeding the cattle—a passenger train.

"Q. That is a passenger train?

"A. Yes, sir.

"Q. But on a freight train, you never ride in the car with the cattle, do you?

A. Sometimes a man—no, don't ride with the cattle; not as a rule you don't. You ride on the caboose. But sometimes you have occasion to go in the car, a stock car, and the train might pull out, or something of that kind and catch you in there—helping up cattle that were down.

"Q. But you never ride in the car with the cattle

between stations, as a general proposition, do you?

"A. As a general proposition, no.

"Q. Well, you have done that?

"A. I have done that, yes.

"Q. Where was that?

"A. In shipping cattle; I remember riding between Pendleton and Echo one time and between the top of the mountain and Pendleton, a part of the time in the car.

"Q. How many cattle did you have in that car?

"A. About twenty four or twenty five.

"Q. What size car?

"A. Thirty six foot car.

"Q. Thirty six foot and twenty four cattle. Where do you ride in the car? What position?

"A. I ride in the car, just on the end of the car; the cattle were in loose; pulled out the end door—pulled out the end guard to get into the car and helped up a steer, and I didn't get out of there. I didn't mean to say that I was riding with the cattle all day.

"Q. You were on the bumper then?

"A. I mean to say I have gotten in a car to help up a steer when the train would start off, and would stay there for length of time, and get out of there after the train would stop. That is all. I do not mean to say that I have ever preferred riding in the car as a matter of preference to the caboose.

"Q. No, I am not saying that, Mr. Burk, I asked if you ever do. Now, I believe you say the cattle don't fight as much when they are running as they do when

standing still on the side track?

"A. I believe I said that, yes.

"Q. But they always fight more or less, don't they?

"A. Some cattle do and some don't.

"Q. Well, range horned stock, driven 150 or 200 miles from a railroad would generally fight and climb over each other a good deal, don't they?

"A. They may. It just depends on the cattle.

"Q. Depends entirely on the cattle, don't it?

"A. Yes.

"Q. And even the gentlest cattle will fight and crowd each other, tramp each other, wont they?

"A. Sometimes.

"Q. And that is why you go along with a prod pole to keep them from doing it?

"A. No, generally go along with a prod pole—have the prod pole to get the cattle up when they are down.

"Q. And they get down as a result of fighting and climbing over each other?

"A. Not always. Sometimes cattle tire, and when they come to a stand still on a side track, the cattle will drop right down. As an illustration of that, the last shipment I had into Portland sometime ago, the cattle train came from Huntington to Portland, and the cattle just laid down and you would have to go around to prod them up with your pole.

"Q. What percentage of them were lying down, half of them?

"A. No, not half of them.

"Q. They can't all lie down at once, can they?

"A. No, I have never seen a car where all were lying down at once, no.

"Q. And if one or two are down, the others usually trample them, don't they?

"A. Yes, if they are down long enough.

"Q. Step on him and hook and bruise them up pretty badly?

"A. They might. Some instances, if one was lying down in the end of the car—it might lie down in the end of the car and not get tramped over; if it lies down and stretches out in the middle of the car, the cattle would naturally step on them and fight and trample them, when not in the end of the car.

"Q. There is always that danger in shipping cattle under the best of circumstances?

"A. There is some danger—some risk.

"Q. That is the reason you have a man along—

"A. Same reason we take—

"Q. Now, I believe you said that the cattle got stale after shipped quite a while?

"A. I don't believe I said that.

"Q. I beg your pardon, if you didn't. That is a fact anyway isn't it?

"A. I don't know what you mean.

"Q. Any cattle will look stale after shipped a long distance, wont they?

"A. Well, a man that is accustomed to shipping all the time and seeing cattle that are in transit all

the time, they may or may not look stale; sometimes they do and sometimes they do not.

"Q. Now, take a shipment from Baker City to South Omaha, for instance, if they went through on passenger train time, they will look stale, when they get to South Omaha, wont they?

"A. I saw a shipment that left Baker City or Ontario this winter, and they looked to me like cattle that never had been loaded at all. They were feeding in Pocatello.

"Q. They didn't look stale?

"A. Not to me, no sir.

"Q. Didn't look drawn?

"A. No, sir, looked fine.

"Q. Wasn't bruised up at all?

"A. No complaint on account of bruises.

"Q. How long had they been on the train?

"A. I don't remember how long. All I know they loaded at Ontarior and first feed they made was at Pocatello; they looked—we commented on the good condition of the cattle.

"Q. That is approximately almost two hundred miles, isn't it?

"A. The first load run out of there—

"Q. Approximately two hundred miles?

"A. Oh, whatever it was.

"Q. Suppose they had shipped them on about thirteen hundred miles more, do you undertake to say they wouldn't look stale and drawn there?

"A. I mean to say that they probably—to a man

that knows his business, that the cattle would show—wouldn't look as good as if moved only 200 miles.

“Q. Sure, that is what I am getting at.

“A. I didn't mean to say that.

“Q. So that cattle shipped a long distance, the cattle will look drawn and roughed up—on shipping a long distance?

“A. Sometimes they do not, no.

“Q. Well, will you tell us an instance where you can ship sixteen cars of cattle fifteen hundred miles and they wont look drawn?

“A. Yes, I can tell you an instance.

“Q. What was the instance?

“A. I have just stated you an instance. I don't understand your expression 'stale' and drawn.

“Q. Well, I am taking your expression for that. I ask you now what it means?

“A. I have shipped cattle in here and I have had them arrive here in good condition, and look to me and to a man who has handled cattle—they didn't look stale and did not look drawn. Other times I have had cattle come in here that looked drawn. All depends upon the condition, the way the cattle were handled in transit.

“Q. Well, I will ask you again and wish you would answer the question?

“A. I will be glad to.

“Q. If cattle are shipped fifteen hundred miles, the cattle under any circumstances will look drawn and stale, wont they?

"A. Not under any circumstances, no sir.

"Q. You say that is not a fact?

"A. Yes.

"Q. Now, I believe you said there is a difference in shrink between a horned animal and a muley animal?

"A. I don't believe I said that.

"Q. Well, what do you say about it?

"A. I said I didn't think there would be much of any difference in the shrink between a horned animal and a muley animal.

"Q. Then you think that horned animals don't hurt each other there in the car any more than muley animals in transit?

"A. I don't state that either. I don't want to give that impression.

"Q. Well, what do you state about it then?

"A. Naturally yes to that. It will be possible for horned cattle to go into the market and not shrink any more than muley cattle, but the horned cattle will go in—might be some of them bruised and some of the muley cattle would not be, provided each of them would fight in the cars in transit. That is what I say, and the shrink at the same time be the same.

"Q. You prefer to ship muleys to horned cattle, don't you?

"A. Well, I would rather ship muleys than horned cattle, yes, sir.

"Q. Why?

"A. For the reason that they have their horns off.

They might scratch themselves and might possibly bruise themselves.

“Q. Sure. They might horn each other?

“A. They might, yes.

“Q. And the muleys can't do that?

“A. The muleys wouldn't but that would make no difference.

Redirect Examination.

“Q. Counsel asked you if in every shipment the owner—the shipper didn't assume some risk of deterioration in the animals. Isn't it a fact that this usual or ordinary shrinkage of seventy or seventy five pounds is intended to cover that risk and does cover it?

“A. The shipper always takes that into consideration when he buys cattle.

“Q. That is covered by the allowance of sixty or seventy five pounds?

“A. It is.

JUROR: I understood the witness to say that these cattle were shipped from Baker City were half horned and the other half muleys?

“A. No, the cattle that I have shipped in my own experience—handled in my own experience were about half horned and half muleys, in arriving at the average shrink of between forty and fifty pounds.”

WILLIAM POLLMAN, being called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

I reside at Baker, Oregon, and have lived there for

the past twenty-three years; I am in the stock business, principally, and have been so engaged ever since I have been in Oregon; I have had experience in buying and shipping livestock, cattle principally; I shipped my first cattle in this country in '92, '91, or '92; have been so engaged ever since; in January, 1909, I made one test shipment of cattle from Baker to Kansas City, or rather from Nampa to Kansas City; I think about eighteen hundred miles, but I couldn't say because I am not familiar with the distances; these cattle averaged twelve hundred forty eight pounds; my shrink on that shipment was seventy-seven pounds to the head; and that was by actual weight at the loading point and where we sold them; these cattle were fed and watered, filled, at Kansas City, that is the usual custom; those are the only cattle that I have shipped East in recent years; I have had experience in shipping from Idaho points to Portland; in my opinion our shrink of seventy-seven pounds per head would be an average shrinkage on a shipment of cattle from Baker City, Oregon, to South Omaha, weighing at point of shipment 1250 or 1260 pounds average and having been Eastern Oregon range cattle and having been fed for sometime on hay before shipment, and having been driven from the town of Haines to Baker City where they were loaded before they were weighed, provided these cattle received the usual and ordinary care in such shipment; some might go a little more and some a little less, but I would consider that a fair shrink; it is the custom to feed

and water stock before sale unless otherwise agreed upon; cattle driven from Ed Cole's place near Haines to Baker City is not subject to any shrinkage at the weighing place; cattle driven ten or twelve miles, is considered fair shrink by the party selling and also by the party buying.

Cross Examination.

Continuing, on cross examination, this witness testified:—

I live in Baker City; these cattle on which I made this test shipment, were Idaho range cattle, fed at Nampa, fed sugar beet pulp and alfalfa hay; these cattle were part horned and part dehorned cattle; didn't ship by the way of Omaha; went over the Short Line and Union Pacific then to St. Joe, I think over the Burlington; I am not sure from there; I can't say; I couldn't say that the conditions are any different over the Burlington than over the Union Pacific; I don't know anything about that; I have never been over this road from the last feeding point, which is in Nebraska, to Kansas City; I would judge our cattle would have gone into Omaha much quicker, and with less time and one less feed than they would have gone into Kansas City, because we fed four times; I saw these cattle of Mr. Kidwell's before they were shipped; they were good Eastern Oregon range cattle; what we would call the average class of our country; I would say that they are good average; good cattle, you know; I couldn't say how these cattle of Kidwell's

compared with the cattle I shipped as a test; this shipment was what we would call our fall cattle; these cattle had been fed up to January; there was some beef among these as I saw them; I was not among these cattle to look at them close; I went by them, was by on the road and stopped and looked at them as they went along; I wouldn't be in position, unless I had gone through the cattle with a view of doing business with them, of giving an opinion that would be fair; it is the custom to buy cattle on a four per cent shrink where you take them right out of the feed lot and drive them right onto the scales, after they have been fed in the morning, to give them a four per cent shrink; it is the custom to sell on a fill where you ship into the market, into the ordinary eastern market, or into this market, unless otherwise agreed upon, your cattle are fed and watered before sold; the care and character of the cattle has a great deal to do with the shrink; if the man in charge did not give the cattle very good care and attention in transit, they would shrink a good deal more than they would if he gave proper attention; and if the railroad company didn't handle them rightly, they would shrink, no matter how well the man took care of them; we have had our best men take cattle along where we have got the worst of it simply because we couldn't take care of the cattle; then we have had other times when we had men that were no good went through and we had light shrink; one of those things you can't tell; the shrink depends upon both the care they get by the man in

charge, and by the way they are handled on the road, by both; both are equally responsible and equally responsible as to the condition and care the cattle would have, or the condition the cattle would be in at the end of the run; I figure a larger percentage of bruises ordinarily on horned cattle than on muley, for the same reason that you go in a corral where there are horned steers, you would be a little more afraid of them than you would if they didn't have horns.

"Q. Well, all cattle under any condition are bound to depreciate in shipment, are they not?

"A. In what way?

"Q. Both in looks and weight and value?

"A. No, I wouldn't say they would depreciate in value. In shipping your cattle, you don't shrink out any fat; if you have good quality in your cattle, you don't lose any of that.

"Q. That is you don't lose any flesh; it is just the filling that comes out?

"A. Cattle if they are handled well will come out in much better shape or in good shape than if badly handled or jammed around.

"Q. I am afraid you don't understand me. You don't mean to say that in shipping stock a long distance on the train they will increase in looks and value?

"A. No, sir.

"Q. So that it is a fact that all stock will depreciate in looks and value when they are shipped a long distance?

"A. No, I don't think they should depreciate in value.

"Q. You think they hold their own?

"A. Yes, they hold their own, as far as value is concerned.

"Q. Then why do you fill them at destination?

"A. Why do we fill them?

"Q. Yes?

"A. I don't say they don't shrink in weight."

The deposition of ALBERT NOE, heretofore taken in this cause at Omaha, Nebraska, was read in evidence as follows:—

I live at Omaha, Nebraska; am sixty seven years of age; have lived in Omaha for the past twenty five years; I am cattle salesman for Clay Robinson Company, South Omaha; have been so engaged for twenty five years; selling cattle a good deal longer than that; Clay Robinson Company do business in South Omaha; Clay Robinson Company do a heavier cattle commission business than any other firm there; I remember the sixteen carloads of cattle, 396 head, consigned by J. C. Kidwell to Clay Robinson Company which arrived about December 20th, 1909, at South Omaha; I sold them on the 20th day of December, 1909; I was looking it up today so that I could see the date; I knew that it was along the latter part of December; it was the 20th day; I sorted them myself—shaped them up and sold them, and I had a good chance to notice them; I observed them carefully; they were flesh mostly—some feeders; there was quite a num-

ber of the cattle that showed car bruises; they had to sell for less price than they do where there are no bruises shown; I do not remember anything else concerning the condition of these cattle other than what I have stated; when cattle are handled by commission firms at the stockyards, they are weighed at the stockyard scales; we have several places to weigh, and where we have lots of cattle and they are crowded we take the other scales; the stock yards company have a weighmaster who weighs them, but you can put them on the scales and weigh them yourself; the weighing is not done at any particular time; whenever we think they are ready for it to be done; the cattle are not weighed when they first come from the cars; no they are fed and watered and sold before they are weighed; I sold these cattle to Swift & Company and W. I. Stevens; I sold 57 head in two bunches and one single one besides to Swift & Company; taking them in bunches, I sold the first bunch of twenty three head weighing twenty-eight thousand seven hundred pounds to Swift & Company at four dollars and sixty cents per hundred; the next bunch was thirty-three steers, sold to Swift & Company, weighing thirty-eight thousand two hundred pounds at four cents a pound, and one other steer weighing nine hundred pounds to Swift at \$3.75 per hundred; we sold three hundred twenty-nine head to Stephens, weight three hundred fifty thousand four hundred sixty pounds at four dollars and thirty cents per hundred, and ten head to Stephens, weight ten thousand six

hundred forty pounds at three dollars and fifty cents per hundred; the total weight of all of these cattle was 428,900 pounds; I am familiar at all times with the market price and value of cattle in the yards at South Omaha; these cattle were sold at the market price on the day on which they were sold December 20th, 1909; I sold these cattle for the best price I could get for them in the condition in which they were; these cattle came from Oregon; I don't remember the starting point; I figured up the other day what would be the average weight of these three hundred and ninety six head of cattle in controversy in this suit when they were sold in South Omaha, but I don't remember now; it is merely a matter of computation, but I don't remember; those cattle would be classed as good fair Oregon; when they arrived there were a few that we could sell for western beef; we sorted them out, but there were few western beef—not many beef—they were lacking in flesh—a few possibly.

“Q. And how would the loss of from 160 to 167 pounds on each animal so shipped as described in the last question affect the market price in South Omaha per pound on December 20th, 1909?

“A. If it was shrinkage in flesh, it would affect it considerable, as they should not sell the same. They would have to be sold as feeders.”

Cross Examination.

Continuing on cross examination, this witness testified:

We have not sold a great many cattle from Oregon, lately; not the last few years; but we have sold a good many; cattle raised in that country wont average as high as cattle raised in other parts of the country; but we get some very high grade cattle from there; they don't average as high as those raised further east—not as high a grade; cattle are classed as to quality—good, choice and fair; the cattle in controversy in this case we call good fair bunch of Oregons; I consider that we got the market price for them on that day for that class; we classed them as fair and good; the market was a little bit higher on that day than it had been for several days before, not much compared with the third day before, that would have been Saturday and we don't have a cattle market on Saturday; I think, if I remember, the market was stronger than on Friday, but I don't remember just how much stronger; have not looked it up closely and don't remember exactly; there is a difference in classification of cattle if they are fat and thin, the fat cattle are called beef and the thin feeders; there is no significance to the term cattle; there are fat steers and fat heifers and we call them beef; feeders could be cows, heifers or steers; only a small portion of these cattle were sold as beef; we classed them as fair to good; there can be fair to good beef and fair to good feeders; we called them a fairly good bunch of Oregon cattle.

The deposition of J. T. SULLIVAN, having been heretofore taken at Omaha, Nebraska, was read as

follows:—

My name is J. T. Sullivan; I live at 1212 North 25th street, South Omaha; I am forty seven years of age; and am assistant cattle salesman under Mr. Noe for Clay Robinson Company; I have been so engaged for twelve or thirteen years; have worked for Clay Robinson Company since 1888; I was a hog salesman for them for awhile prior to the time I became a cattle salesman for them; I remember these 396 head of cattle in controversy in this suit; I saw them at South Omaha; these cattle looked stale when they arrived; they did not look like cattle that were fresh; they looked like they had been held at different places; their hair turned in like—that is what we term stale cattle; some of them were bruised; this condition affects the selling price; they don't bring the same price as fresh cattle; we have to sell them for less than fresh cattle, of course; the bruises would affect the selling price of the cattle, but of course, that would depend upon the kind of bruises they were; I cannot give the extent of these bruises, but the cattle were bruised some and showed rubbing in the cars; this would lower the selling price, of course; I have had no experience in shipping cattle from points as far west as Huntington, Oregon, or American Falls, Idaho; from my own experience I know nothing about the weight of cattle at point of origin, but cattlemen have often told me the weight of cattle at the point of origin; I don't know as I have had any experience in the reputed weight of cattle at a point of origin as far

west as Oregon outside of this particular bunch of cattle; I suppose I am acquainted with the reputed weight of cattle at a point of origin one thousand miles distant from Omaha; if the reputed weight at point of origin be 1250 pounds, the ordinary and usual shrinkage when they arrive at South Omaha would be about one hundred pounds per head on that weight of cattle; it might run less than that, it depends upon the cattle; I am familiar with the market price in the month of December, 1909; at South Omaha; I know what these cattle sold for; if these cattle had suffered only the usual shrinkage they having more flesh, they would have brought more money; they would have brought considerable more money—I couldn't say just how much.

Cross Examination.

On cross examination, this witness testified:

I am engaged daily in handling and selling stock at South Omaha; have been since the 20th of December, 1909; I do not attempt to remember every load of cattle that I have handled; I wouldn't say that I frequently receive shipments of cattle that have as many in as this bunch of cattle, but we do sometimes; I have looked up the records on these cattle; did not receive the best price for these cattle; any man can tell stale cattle from fresh cattle; I don't know whether or not there was a caretaker with these cattle; I did not see him; but I presume so; cattle that have been shipped fifteen hundred or two thousand miles are never as fresh as cattle that arrive from nearby points; they

are always more or less tired, but not necessarily bruised; we have a good many cattle come from that far and arrive in good condition; sometimes cattle shipped twelve and fifteen hundred miles to two thousand miles would show no more bruises than steers on a farm; a good deal of these bruises might have been caused in the pens; I believe so; they showed rubbing in the cars; all of these bruises might have occurred outside of the cars; they might have been bruised by driving them into the cars, or into the pens in the yards; and they might have been bruised while they were being reloaded at points where they were unloaded en route; possibly they might have been bruised being unloaded into the pens after they arrived in South Omaha, but the chances are that they were that way before they were unloaded at South Omaha; I did not see these cattle when they first arrived at South Omaha; I saw these cattle when they came from the chute; they are first taken from the cars to the pens; they are divided up and put in where there will be room enough; we do not feed them; we have no rule as to how many cattle shall be placed in a pen of a certain size, but we never crowd them and give them a fair chance with room enough to rest; cattle sometimes receive bruises and cuts after they are unloaded at South Omaha; after they are put into the pens they are sorted over and separated into beeves, feeders, etc.; possibly some bruises might be caused by cutting them out or sorting them.

JAMES G. KIDWELL, being recalled as witness

in his own behalf, testified as follows:—

“Q. I wish you would look at your memorandum and see just what time you were loaded and ready to leave American Falls, Idaho?

“A. Four forty p. m., December ninth.

“Q. You testified yesterday in your direct examination as to the dimensions of the stock yard at Shoshone, I wish you would state whether or not that was based on an estimate or on actual measurement?

“A. The last time I was there, I measured it; stepped the first time and measured the last; eighty five feet wide, one corral, 125 feet long; the runway across the outside or end 85 feet was fifteen feet outside. I have the diagram of it if you want to see it.”

Counsel for plaintiff here offered in evidence a pamphlet for the purpose of showing the distance between the various stations on the line of the defendant's railroad testified to and also map showing locations, which was received in evidence and marked “Plaintiff's Exhibit No. 1,” and which was and is in words and figures as follows.

Miles.	Station.
0	Granger.
8	Moxa.
16	Nutria.
25	Opal.
33	Waterfall.
39	Diamondville.
40	Kemmerer.
42	Moyer Junction.

Miles.	Station.
50	Fossil.
56	Nugget.
63	Sage.
72	Beckwith.
77	Pixley.
83	Cokeville.
92	Border.
98	Pegram.
108	Dingle.
115	Montpelier.
129	Novene.
136	Manson.
140	Rose.
145	Stockyards.
146	Soda Springs.
152	Alexander.
156	Way.
162	Bancroft.
170	Pebble.
177	Lava.
184	Topaz.
191	McCammon.
196	Onyx.
202	Inkom.
208	Portneuf.
214	Pocatello.
223	Michaud.
239	American Falls.
247	Coolidge.

Miles.	Station.
256	Wapi.
237	Minidoka.
289	Kimama.
304	Owinza.
314	Dietrich.
322	Shoshone.
331	Tunupa.
338	Gooding.
345	Fuller.
351	Bliss.
358	Ticeska.
367	King Hill.
374	Glenns Ferry.
383	Hammett.
385	Medbury.
394	Reverse.
404	Mountain Home.
415	Cleft.
425	Orchard.
437	Owyhee.
445	Mora.
449	Kuna.
459	Nampa.
468	Caldwell.
474	Notus.
483	Parma.
491	Nyssa.
494	Arcadia.
501	Ontario.

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437	Owyhee.
445	Mora.
449	Kuna.
459	Nampa.
468	Caldwell.
474	Notus.
483	Parma.
491	Nyssa.
494	Arcadia.
501	Ontario.

Miles.	Station.
505	Payette.
518	Weiser.
532	Old's Ferry.
539	Blakes.
541	Huntington.

Thereupon the defendant moved for a nonsuit as follows:

"Comes now the defendant, the Oregon Short Line Railroad Company and moves the Court for a judgment of non-suit upon the ground that a sufficient case has not been made to submit to the jury.

"First, whatever if any delay or shrinkage above the normal shrink, as shown by the evidence, was caused by circumstances and conditions over which this defendant had no control and for which a carrier is never held liable as a matter of law.

"Second, the plaintiff cannot recover for alleged extra feed bill at Valley for the reason that his witnesses testified that it was the custom to stop and feed cattle at that point in order to fill them up and rest them for the Omaha market. In any event, the defendant was in no wise connected with the delay at Valley.

"Third, no recovery can be had in this case on account of the alleged rough handling of the stock, for the reason that plaintiffs' witnesses stated that the jars and shakes referred to might have been the incidental jars and shakes incident to the operation of a long freight train under ordinary circumstances.

“Fourth, There is no evidence showing or tending to show that plaintiff’s stock was injured through the negligence of this defendant while in transit, and for this reason a verdict for the plaintiff would be founded upon mere conjecture and speculation.

“Fifth, Plaintiff failed to prove that he gave notices to the defendant of his alleged claim within ten days of unloading the stock at destination and before the stock had been intermingled with other stock, as required by the contract of shipment.”

Which motion for a non-suit the Court then and there sustained as follows:

“This complaint alleges that on the fourth day of December, the defendant railroad company received at Huntington three hundred and ninety eight head of cattle in good condition of a certain average value for transportation over the aforesaid railroad and the Union Pacific Railroad Company to South Omaha, Nebraska. That is the cause of action set out in the complaint; alleges that it was received for that purpose, which would make it, on the face of the complaint, a through shipment, and in addition to that it was so treated by the parties, because afterwards Mr. Kidwell applied for and received the return of his over payment. So, taking the complaint as it alleges, I infer that it is stated in the record as a through shipment, and if it was a through shipment, it was made under this bill of lading, because it originated at Baker City and was received by the defendant company at Huntington under this particular bill of lad-

ing, which was set out in the answer and admitted by the reply. So that I take it the question on this action, and the only question necessary now for the court to determine is whether or not the plaintiff has complied with the clause in this contract which required him to make a claim for damages within ten days from the date of unloading the shipment at destination and before the stock had been mingled with other stock. Now the only evidence in regard to that claim is the testimony of Mr. Kidwell that he told some of the agents along that line that he would have a claim, that he would put in a claim, or some language of that kind, but there is no evidence he ever did put in a claim, and I don't understand for a shipper to simply tell a station agent along the road that he proposes to put in a claim is a compliance with the provisions of this contract. That claim was to be put in in accordance with the terms of this agreement after the stock had arrived, and in order to be a claim, it seems to me it should specify in some way the nature and character of the damages, so the company might be prepared to make settlement if it desired to do so, or investigate it, but it isn't enough for the shipper to complain to the agents along the way that he proposes to put in a claim, unless he proceeds to do it. Under that Washington case, as I remember it, the claim was in fact put in but after ten days and it was a question of waiver, rather than failure to put in a claim at all, and the court held it was a case of waiver, the same as the case here of Kidwell & Caswell against

the Southern Pacific. In that case Kidwell & Caswell proved it was waived, because he took up the case and was put off from time to time. In this case there is no provision of that kind, and I don't see any other way."

I have examined with care this motion for a directed verdict upon the ground, among other things, that no claim for damages was presented by the shipper as required by the contract of shipment. Now, it is said, in the first place that there are two shipments—two separate shipments alleged in the pleadings and that the contract entered into at Baker City could apply only to the first shipment, or the shipment from Baker City to Minidoka. Now, the complaint plainly alleges a shipment from Huntington over the lines of the Short Line and Union Pacific to South Omaha; it alleges that the stock were billed to the consignee at Minidoka, it being the intention of the plaintiff, as known to the defendant to continue the transportation from Minidoka to South Omaha, and that when the stock arrived at Minidoka, what is now claimed to through to South Omaha. The complaint then alleges that during the shipment from Huntington to South Omaha, the stock were held in confinement more than 36 hours without food and opportunity to rest, and that when they arrived at South Omaha they were damaged to a certain amount, and a claim is made for the damages to the stock incurred en route. There is no separate cause of action set out in the complaint. It is not alleged that there was a shipment from Huntington to Minidoka and that certain dam-

ages occurred on that shipment, and that there was another shipment from American Falls to South Omaha and that certain damages occurred on that shipment, but it is alleged as one cause of action and as one continuous shipment over the Short Line and its connecting carriers, so that I am unable to construe the complaint in any way other than as one continuous shipment, and this is borne out by the testimony in the case and the conduct of the parties. When the stock arrived at Minidoka, what is now claimed to be the end of the first shipment, the consignee refused to unload them—refused to take them off the train. If that was the end of the contract, it was his duty to do that; the company was under no obligation to carry them any further for him except on one shipment, but he refused to unload them at that place because there was no proper stock yard for rest and feed, which implies he considered it a continuous shipment and a place should be provided—a place where they could be fed—and not the end of the contract of carriage. In addition to that, the proof all through the trial has shown or indicated a claim on the part of the plaintiff for damage occurring during the entire shipment, so I take it this must be held and construed to be an action to recover damages for the entire shipment and on one contract. Now, the shipment was made originally under a special contract, special agreement in which it was stipulated that unless claim for loss or damage or detention are presented within ten days from the date of the unloading of the stock at

destination and before the stock has been intermingled with other stock, such claim shall be deemed waived and the carrier and each thereof shall be discharged of liability. Now, this provision has been held by the courts of Oregon and by the courts generally to be a reasonable and valid stipulation and one that the shipper is required to comply with before he has a cause of action against the transportation company, and its purpose is manifestly to enable the carrier to make inquiry as to the amount of the damages in the first place—give him an opportunity to make inquiry as to the amount of the damages before the stock has been mingled with other stock; and in the second place, give it an opportunity to settle the claim if it is desired to do so without action, and under this provision, as I understand the law, the shipper cannot maintain an action until he makes his claim unless it has been waived by the action and conduct of the carrier. Now, many cases have been cited and my attention has been called to several cases holding that where the contract of shipment is to a destination off of the line of the initial carrier, at which time the initial carrier has no agent, certain stipulations in the contract are void because they are unreasonable. Now, in the Minnesota, Texas, Missouri and Illinois cases to which my attention has been called, the action was against the initial carrier and the contracts provided that the notice of claim for damages should be given to the agent of the initial carrier and before the stock was removed, and the courts held that this stipulation

was unreasonable and void where the destination was at a point not on the line of the initial carrier and at which the initial carrier had no agent to whom claim for damages could be made. In the Virginia case the contract provided that the claim must be filed with the carrier, according to law within five days, and the Utah case holds that a provision similar to this in this contract would not be presumed reasonable but the burden was on the railway company to show that it was reasonable in fact, and that is not in line with the decision in this state, nor, as I understand, in line with the general authorities upon this question.

Now it may be and is quite probable that under this contract, since the claim for damages must be made at the point of destination, that a claim made to the agent of the connecting carrier at that place would have complied with the terms of this contract. In other words, it is probable that this contract contemplated that the agent of the connecting carrier at the point of destination should be the agent of the initial carrier and any of the connecting carriers for the purpose of receiving a claim for damages, but in this case the evidence shows that no claim for damages was made at all. Mr. Kidwell says that he told the agents along the line, several of them, and I believe at South Omaha, that he would make a claim for damages, or that he would insist upon a claim, but he did not make any; he did not undertake to make any formal claim for the loss or damage, and as I view the law, that is a condition precedent to his right to maintain this ac-

tion, and under that view I am constrained to hold that the motion for a non suit is well taken and should be allowed.

To which ruling of the court counsel for the plaintiff then and there excepted, which exception was allowed by the court.

UNITED STATES OF AMERICA,

District of Oregon—ss.

The foregoing billl of exceptions contains all the proofs make, evidence adduced, and proceedings had, upon the trial of this action before me, R. S. Bean, Judge of the District Court of the United States for the District of Oregon.

And, now, that the foregoing matters may be made a part of the record, the undersigned, judge of the District Court of the United States for the District of Oregon, at the request of the plaintiff, James G. Kidwell, doth hereby allow, settle and sign, within the time allowed by the law and the order of this court, the foregoing bill of exceptions, and order the same to be filed.

Dated this 29th day of August, 1912.

R. S. BEAN,
District Judge.

[Endorsed]: Bill of Exceptions. Filed Sep. 20, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 3 day of December 1912 there was duly filed in said Court, a Petition

for Writ of Error in words and figures as follows,
to wit:

[Petition for Writ of Error.]

(Title.)

To the Honorable the Judges of the District Court
of the United States for the District of Oregon:

Your petitioner herein, James G. Kidwell, brings
this, his petition for a writ of error to the District
Court of the United States for the District of Oregon,
and thereupon your petitioner shows:—

That on the 11th day of June, 1912, there was rendered and entered in the District Court of the United States for the District of Oregon a judgment against your petitioner in favor of the above named defendant, the Oregon Short Line Railroad Company, that the complaint of your petitioner herein be dismissed and that said defendant recover its costs and disbursements from your petitioner herein taxed at \$256.85, and that execution issue therefor in an action theretofore begun and then pending therein upon a trial of said action and the sustaining of the defendant's motion for a nonsuit by the court; and your petitioner shows that there was manifest error in the record and proceedings had in said cause and in the rendition of said judgment to the great injury and damage of your petitioner all of which error will be made more fully to appear by an examination of said record and especially by the bill of exceptions by your petitioner tendered and filed therein and by the assignment of

errors filed herewith.

To the end, therefore, that the said judgment and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a WRIT OF ERROR may be issued directed to the said District Court of the United States for the District of Oregon returnable according to law and practice of the Court, and that there be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignments of error, and all proceedings had in the said cause in which said judgment was rendered against your petitioner that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner, and that the judgment rendered in this cause may be reversed and held for naught and said cause be remanded for further proceedings, and that an order may be made fixing the amount of bonds in said cause upon said writ and for such other orders and process as may be required herein.

SHARPSTEIN & SHARPSTEIN,
and KING & SAXTON,

Attorneys for Plaintiff and Petitioner.

[Endorsed]: Petition for Writ of Error. Filed
Dec. 3, 1912.

A. M. CANNON,
Clerk U. S. Dist. Court.

And afterwards, to wit, on Tuesday, the 3 day of December 1912 the same being the Judicial day of the Regular November 1912 Term of said Court; Present: the Honorable R. S. BEAN United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Allowing Writ of Error.]

(Title.)

Now at this time comes the plaintiff by F. M. Saxton, of counsel, and presents to the Court a Petition praying for the allowance of a Writ of Error in the above entitled cause and also presents with said Petition his assignments of error and moves the Court for an order allowing said Writ and fixing the amount of bonds to be given by said petitioner thereon.

Whereupon, it is Ordered that a Writ of Error in this cause be and the same is hereby allowed as prayed for in said Petition and that said plaintiff give a bond as provided by law in the sum of One Thousand Dollars.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 3 day of December, 1912 there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

[Assignments of Error.]

(Title.)

Comes now the plaintiff and files the following As-

signment of Errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause, to wit:—

I.

That the District Court of the United States for the District of Oregon erred in sustaining defendant's motion for a nonsuit upon the trial of said cause after plaintiff had introduced his testimony and rested.

II.

That said Court erred in rendering judgment against plaintiff and in favor of defendant dismissing said cause upon the completion of plaintiff's testimony upon the trial of said cause.

WHEREFORE, The Plaintiff prays that the Judgment of said Court be reversed and that said cause be remanded for a new trial.

SHARPSTEIN & SHARPSTEIN,
and KING & SAXTON,
Attorneys for Plaintiff.

[Endorsed]: Assignment of Errors. Filed Dec. 3, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 3 day of December 1912 there was duly filed in said Court, a Bond in words and figures as follows, to wit:

[Bond.]

(Title.)

KNOW ALL MEN BY THESE PRESENTS,

That We, James G. Kidwell, and H. H. Trowbridge and J. C. Lonergan are held and firmly bound unto the defendant, Oregon Short Line Railroad Company, in the sum of One Thousand Dollars, to be paid to the said Oregon Short Line Railroad Company, its successors and assigns.

To which payment, well and truly to be made we bind ourselves, and each of us jointly and severally, and our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 30th day of November 1912.

WHEREAS, the above named James G. Kidwell has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled court entered by the District Court of the United States for the District of Oregon.

NOW, THEREFORE, the Condition of this obligation is such that if the named James G. Kidwell shall prosecute said Writ to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

JAMES G. KIDWELL.

H. H. TROWBRIDGE.

J. C. LONERGAN.

United States of America,
District of Oregon.—ss.

I, H. H. Trowbridge and I, J. C. Lonergan being

first duly sworn, depose and say: that I am one of the sureties in the foregoing bond, that I am a resident and householder within said district and that I am worth in property situated therein the sum of Two Thousand Dollars over and above all my just debts and liabilities and exclusive of property exempt from execution.

H. H. TROWBRIDGE.

J. C. LONERGAN.

Subscribed and sworn to before me this 30th day of November, 1912.

JULIUS COHN.

Notary Public for Oregon.

(Notarial Seal)

Examined and approved this 3 day of Dec. 1912.

R. S. BEAN,

Judge.

[Endorsed]: Bond. Filed Dec. 3, 1912.

A. M. CANNON,

Clerk U. S. Dist. Court.

And afterwards, to wit, on the 4 day of December 1912 there was duly filed in said Court, a Writ of Error in words and figures as follows, to wit:

[Writ of Error.]

In the United States Circuit Court of Appeals for the Ninth District.

JAMES G. KIDWELL,

Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Defendant in Error.

THE UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.To the Judges of the District Court of the United
States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable R. S. Bean one of you, between James G. Kidwell plaintiff and plaintiff in error, and Oregon Short Line Railroad, a corporation, defendant and defendant in error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit

Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE,

Chief Justice of the Supreme Court of the United States this 3 day of December 1912.

[L. S.]

A. M. CANNON,

Clerk of the District Court of the United States for the District of Oregon.

By.....Deputy.

[Endorsed]: Writ of Error. Filed Dec. 4, 1912.

A. M. CANNON,

Clerk, U. S. District Court, Oregon.

And afterwards, to wit, on the 3 day of December 1912 there was duly filed in said Court, a Citation on Writ of Error in words and figures as follows, to wit:

[Citation on Writ of Error.]

In the District Court of the United States for the District of Oregon.

JAMES G. KIDWELL,

Plaintiff.

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,

Defendant.

United States of America,
District of Oregon—ss.

The President of the United States to the Oregon
Short Line Railroad Company, a Corporation,
GREETING:

You are hereby cited and admonished to be and appear before the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of Oregon in the above entitled cause, wherein James G. Kidwell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White,
Chief Justice of the United States, this 3rd day of
December, 1912.

R. S. BEAN,
Judge.

Due service of the foregoing citation is hereby accepted in Multnomah County, Oregon, this 3rd day of December, 1912.

A. C. SPENCER,
of Attorneys for Defendant, Oregon
Short Line Railroad Company.

[Endorsed]: Citation. Filed Dec. 3, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Tuesday, the 31 day of

December 1912 the same being the.....Judicial day of the Regular November 1912 Term of said Court; Present: the HONORABLE R. S. BEAN United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

*In the District Court of the United States for the
District of Oregon.*

JAMES G. KIDWELL,

Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COM-
PANY, a corporation,

Defendant.

December 31, 1912.

Now, at this day, for good cause shown, it is ordered that plaintiff's time for filing the record and docketing this cause on writ of error in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended ninety days from this date.

CHAS. E. WOLVERTON,

Judge.

No. 2247

In the

**United States Circuit Court
of Appeals
For the Ninth Circuit**

JAMES G. KIDWELL,

Plaintiff in Error,

vs.

**OREGON SHORT LINE RAIL-
ROAD COMPANY,** a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Writ of Error to the District Court of the United States
for the District of Oregon.

SHARPSTEIN & SHARPSTEIN of Walla Walla,
Washington, and **KING & SAXTON**, of Portland,
Oregon,

Attorneys for Plaintiff in Error.

P. L. WILLIAMS, of Salt Lake City, Utah, and
W. W. COTTON, **A. C. SPENCER** and **W. A.
ROBBINS**, of Portland, Oregon,

Attorneys for Defendant in Error.

STATEMENT.

This action was instituted by the plaintiff in error, James G. Kidwell, hereinafter called the plaintiff, against the defendant in error, the Oregon Short Line Railroad Company, hereinafter called the defendant, in the Circuit Court of the State of Oregon for the County of Baker for the recovery of \$4,927.00, as damages suffered by the plaintiff by reason of the shipment of 16 carloads of cattle from Baker, Oregon, on December 3, 1909, over the line of railroad of the defendant. On petition of the defendant said cause was removed to the Circuit (now the District) Court of the United States for the District of Oregon. The cause having been put at issue by the pleadings came on for trial on July 7, 1912, before Judge R. S. Bean and a jury; and the plaintiff having introduced his testimony and rested, the defendant filed its motion for a nonsuit, which motion was sustained by the Court and a judgment dismissing said cause granted and entered.

The only assignments of error are the sustaining of said motion for a nonsuit and the granting of said judgment dismissing said cause.

POINTS AND AUTHORITIES.

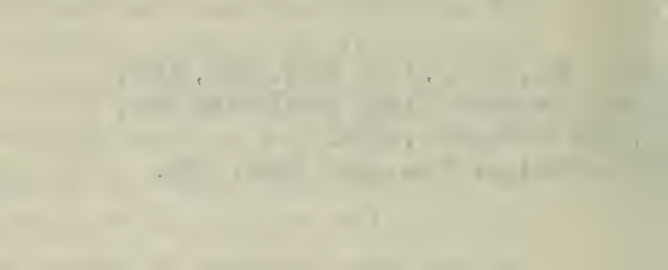
I.

Where a carrier keeps livestock in its cars for more than twenty-eight consecutive hours, contrary to the

U.S. vs. So. Pac., 157 Fed. 459, 463.

U.S. vs. Kansas City Southern Ry.
Co., 189 Fed. 471, 479.

U.S. vs. Union Pac. 169 Fed. 68.



provisions of the statute, such act constitutes negligence *per se*, and the carrier is liable not only for the penalty prescribed, but also for any damage or injury that may thereby be sustained by the owner of the stock.

Reynolds vs. Great Northern Ry. Co., 40

Wash. 163, 111 Am. St. 883, 891.

Nashville R. Co. vs. Heggie, 86 Ga. 210,

22 Am. St. 453, 455;

Baltimore etc. R. Co. vs. Wood, 130 Ky.

839, 114 S. W. 734;

Cincinnati etc. R. Co. vs. Guering, 30 Ky.

Law Rep. 1180, 100 S. W. 825.

II.

The Carmack Amendment to the Hepburn Act provides: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: *Provided*, That nothing in this section

shall deprive any holder of such receipt or bill of lading of any remedy or right which he has under existing law."

1909 Suppl. Fed. Stat. Ann, 273.

III.

The burden of proving the **reasonableness** of a provision of a limited liability contract of affreightment requiring notice of claims for loss or damage as well as plaintiff's failure to comply with the terms of such provision is upon the carrier.

Hutchinson on Carriers (3d ed.), Sec. 447
and cases cited.

Houtz vs. Union Pacific R. Co., 33 Utah,
175, 93 Pac., 439, 447;

Ft. Worth etc. R. Co. vs. Greathouse, 82
Tex. 129; 17 S. W. 834, 838 Sec. 8;

Cox. vs. Vermont Cent. R. Co., 170 Mass.,
129, 49 N. E. 97, 101;

St. Louis etc. R. Co. vs. Hayes, 13 Tex.
Civ. App. 577, 35 S. W. 476 Sec. 2;

Hatch v. Minneapolis etc. R. Co., 15 N.
D. 491, 107 N. W. 1087, 1088;

St. L. & S. F. R. Co. vs. Bryce, 110 S. W.
529.

6 Cyc. p. 507, and cases cited.

5 Am. & Eng. Enc. Law (2d Ed.), p. 325

Sec. 4, and cases cited.

IV.

Since the purpose of a provision in a limited liability contract requiring notice of loss or damage is to afford the carrier a prompt opportunity to investigate the nature and extent of an alleged injury, such provision will be construed as referring only to claims for injuries *to the stock themselves*, and not to claims for damages arising from a decline in the market or extra feed due to delays by the carrier.

Hutchinson on Carriers (3d Ed.), Sec.

445.

Klass Commission Co. vs. Wabash R. Co.,

80 Mo. App. 164, 168;

Kramer vs. Chicago etc. R. Co., 101 Iowa

178; 70 N. W. 119;

Pecos & M. T. R. Co. vs. Evans-Snyder-

Buell Co., 100 Tex. 190, 97 S. W. 466;

Estes vs. Denver etc. R. Co., 49 Colo. 378,

113 Pac. 1005, 1009;

St. Louis etc. R. Co. vs. Hurt, 135 S. W.

599;

Loeb vs. Wabash R. Co., Mo. 85 S. W.

118;

Aull vs. Railroad, 116 S. W. 1122.

V.

Notice to last carrier is sufficient.

Ry. Co. vs. Heyser, 95 Ark. 412, 130
S. W. 562.

VI.

The payment of the "regular tariff rate" by a shipper entitles him to transportation of his goods by the carrier without any limitation upon the carrier's liability, notwithstanding any provisions of the contract to the contrary.

Holland vs. Chicago etc. R. Co., 123
S. W. 987;

George vs. Ry. Co., 214 Mo. 551; 113
S. W. 1099; 127 Am. St. 690, 693, 699;

Besheer vs. St. Louis etc. R. Co., 131 S.
W. 767;

Burns vs. Chicago etc. R. Co., 132 S. W. 1.

VII.

A limited liability contract of affreightment must be supported by an independent consideration.

Hutchinson on Carriers (3d Ed.), Sec.
475.

George vs. Ry. Co., 214 Mo. 551; 127 Am.
St. 690, 695.

6 Cyc. p. 395, Sec. e, and cases cited.

5 Am. & Eng. Enc. Law (2d Ed.), p. 298,
subd. 5b and cases cited.

FACTS PROVEN.

The bill of exceptions brings up all of the evidence, from which it will appear that plaintiff herein (Transcript, p. 41), when he billed said cattle at Baker City, Oregon, over the O. R. & N. Co. railroad, stated to the agent that he wanted to ship to South Omaha with a feed in transit rate to some point in Idaho around American Falls or Minidoka, provided there were good feed yards there. After investigation said agent reported to plaintiff that he had no feed in transit rate and advised plaintiff to bill them local to Minidoka, where he said (Tr. p. 42) there were good feed yards. Accordingly these 16 cars of cattle were billed to Minidoka, Idaho. There were 398 head of these cattle. They were all loaded and billed (Tr. p. 42) and ready to leave Baker City at 7:45 o'clock p. m. on December 3, 1909, but the train did not get started until 9:05 o'clock of that day. They arrived in Huntington at 2:30 o'clock the next morning when they were turned over to the Oregon Short Line Railroad Company, the defendant. The line of railroad of the defendant extends from Huntington, Oregon, to Granger, Wyoming, a distance of 541 miles (Tr. pp. 161-164). This shipment of cattle was delayed at Huntington while an engine was brought from Glens Ferry, 267 miles, to pull them (Tr. p. 42). Leaving Huntington, they reached Glens Ferry at 8:00 o'clock p. m.

December 4, after experiencing a great deal of switching and jamming and standing upon side tracks (Tr. p. 43). At Glens Ferry, plaintiff, upon demand of defendant, signed a release allowing the cattle to be run for 36 hours. The rough treatment of these cattle by jamming, switching and standing on side tracks continued until Shoshone was reached at 3:30 a. m. December 5 (Tr. p. 44). Several hours were consumed at Shoshone in endeavoring to determine whether the cattle should be unloaded for rest, feed and water (Tr. pp. 44-47). The plaintiff examined the yards and found that it would require yards four times their size properly to rest, feed and water said 398 head of cattle, and besides there was neither feed nor water that could be had. The plaintiff demanded that the cattle should be run on to Minidoka, their destination. The defendant kept these cattle standing on side track at Shoshone from 3:30 a. m. until 11:00 a. m.

NO STOP AT MINIDOKA.

Finally, after a delay of seven and one-half hours at Shoshone, an engine was put on and the cattle started toward their destination, but they did not stop there (Tr. p. 48). They went right on through Minidoka to American Falls, a distance of 33 miles. The record (Tr. pp. 47-48) disclosed the reason. There were no feed yards at all at Minidoka, and had not been for six or eight months, and they reached American Falls at 4:03 p. m. December 5, where the cattle were unloaded

after having been held without being unloaded for rest, feed or water from 7:05 p. m. of December 3, to 4:03 p. m. of December 5, being 43 hours and 18 minutes, allowing one hour for change from Pacific to Mountain time.

EFFECT OF TREATMENT ON CATTLE.

Plaintiff describes the condition of these cattle when they reached American Falls, as follows (Tr. p. 50): "They were badly bruised and awfully bad shrunk, drawn, awfully drawn up and they was bruised and the hair was rubbed off lots of them; this condition was caused by bad handling and standing along siding along the railroad from Huntington to American Falls; from my experience as a cattle shipper, I would say that standing cattle on siding causes them to get nervous and restless, to fight, and lay down, get down in the car and tromp each other, jamming cattle causes them to get bruised, rubbed, they get down and rub each other, crowd up and skin up all the way along when they are jamming and unloading rough; if cattle go for a long period without food, rest or water, it causes them to get down, if you stand cattle, if you overrun them, if you keep them on cars too long, they were going to get tired, quit, and lay down and fall down and bruise up; they shrink away; they shrink all the time after they begin to bruise; if they get bruised up and sore up they begin to shrink and shrink fast; these cattle were in good condition when they arrived in Huntington, Oregon, all standing and all right."

At American Falls (Tr. p. 51) the plaintiff paid the freight from Baker City to Minidoka according to the billing, no charges being made by the defendant from Minidoka to American Falls, and took possession of the cattle and put them in a good pasture (Tr. p. 49), where there was lots of grass and fed them hay in addition.

PLAINTIFF ABANDONS ORIGINAL INTENTION.

Plaintiff's intention originally (Tr. p. 94) was to hold these cattle on feed in Idaho for the purpose of shipping them on to the eastern market at Omaha whenever the market was inviting; as he puts it "speculating upon the possibility of a better market." However, they were so sore, bruised and drawn when they reached American Falls (Tr. p. 45), that plaintiff decided that he would have to hold them too long, five or six weeks, to get them back on their feed like they were when they started, or like they would have been with good treatment.

SECOND SHIPMENT.

Hence, after a rest of four days near American Falls, plaintiff decided to ship to South Omaha and did ship these cattle to South Omaha (Tr. p. 51), under a new contract and billed at local rate. He left American Falls at 4:40 o'clock p. m. December 9, and after much rough treatment and delays (Tr. p. 54) arrived in Green River at 10:40 p. m. December 10 (Tr. p. 50), making 30 hours

that the stock were confined without rest, food or water.

The run over the Union Pacific from Granger to South Omaha was a great improvement over the treatment received on the Short Line, although these cattle received some rough treatment at several points on the Union Pacific. From 90 per cent to 95 per cent (Tr. p. 95) of the damages to these cattle was caused by the treatment received on the defendant's line.

LOSS IN SHRINKAGE.

These cattle weighed on an average 1,260 pounds each (Tr. p. 41) when loaded at Baker City and weighed 1,083 pounds each (Tr. p. 55) when they arrived at South Omaha, showing a shrinkage of 177 pounds each. The shrinkage between Baker City and American Falls was 140 to 150 pounds per head (Tr. p. 129). The usual, customary and normal shrinkage would be (Tr. pp. 90, 104, and 132) 75 to 80 pounds; hence the excess shrinkage was about 100 pounds per head to Omaha and about 70 pounds to American Falls.

LOSS IN MARKET PRICE.

These cattle sold at Omaha at an average of \$4.27 per hundred but if they had received the usual and customary treatment in transportation, the market price (Tr. p. 56) would have been \$5.00 per hundred.

LOSS ON EXTRA FEED.

The plaintiff stopped at Valley, Nebraska (Tr. p.

53), and fed these cattle for three days, which would not have been necessary (Tr. p. 94) if the cattle had received proper treatment in transportation. Plaintiff paid \$340.00 (Tr. p. 94) for feed at this point.

REGULAR TARIFF RATE.

On arrival at South Omaha plaintiff paid the freight from American Falls to South Omaha at the local rate (Tr. p. 57). After plaintiff returned to Portland the railroad company refunded to plaintiff \$600.00 on account of the freight on these cattle, reducing the charge thereby to what it would have been on a through shipment from Baker City to South Omaha at the *regular tariff rate*.

PLAINTIFF'S LOSS.

Plaintiff's loss, therefore, on account of the treatment received in the transportation of these cattle was: First, 73 cents per hundred on the market price of these cattle; Second, Shrinkage in the weight of these cattle of about 100 pounds per head, aggregating nearly 40,000 pounds; and Third, Extra feed at Valley, Nebraska, costing plaintiff \$340.00.

LIMITATION OF LIABILITY.

The shipment from Baker City to Minidoka was made under a limited liability livestock contract which contained, *inter alia*, the following limitation (Tr. p. 28) :

“9. Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock, shall have the benefit of any insurance that may have been effected thereupon.”

NO LIMITATION OF LIABILITY ON SECOND SHIPMENT.

On the shipment of these cattle from American Falls to South Omaha it does not appear that there is any limitation upon defendant's liability.

NOTICE OF CLAIM FOR DAMAGES.

Plaintiff testified (Tr. p. 59 et seq.):

“Q. Now, in reference to the claim that you made, if you made any claim there before you arrived at Omaha, or after you arrived there. State what you did in regard to making a claim against the company for damages.

A. Well, at Shoshone, I told the agent there—called Mr. Lonergan and Mr. Trowbridge, both my men with me; Mr. Trowbridge was interested in the cattle—told the agent there that the railroad company would have to—I was going to put in a claim and he notified them to that effect, for side tracking these cattle, and

handling them bad from Huntington until the time I left there. And when I got to American Falls, I told the agent there would be a claim against the company for damages sustained and injury to these cattle. When I got to Laramie City, I told the agent there that two steers jumped out of the cars at Medicine Bowl, and that the Union Pacific would pay for them, and in addition to that there would be a claim for damages on the Short Line, possibly some of it on the Union Pacific going to South Omaha; after these cattle or about the day they were sold there, and I paid the billing freight—and talked to the agent there at South Omaha, and told him the same thing. That is the man I talked to. * * *

Q. I will ask you what this paper is, Mr. Kidwell, do you recognize it?

A. Yes, sir.

Q. What is it? You may state what this is, Mr. Kidwell?

A. It is a statement for claim that I put in against the O. S. L. and Union Pacific railways for injuries and damages sustained to the cattle.

Q. You put that in here in Portland, did you?

A. I did. Yes, sir.

Q. How did you come to put that claim in here at Portland?

A. Well, I lived here and the agent at South Omaha—I had two steers killed on the Union, I took up with him, and he said take it up with the Claim Department; and he said the other claim might just as well be put in here; the main damage was on the Short Line.

ARGUMENT.

On pages 165-171 of the Transcript will be found the opinion of the lower court in passing upon the motion for a nonsuit in this case, which shows that the only point upon which the lower court considered the evidence insufficient was upon the question of the sufficiency of plaintiff's notice to the defendant of his claim for damages. We do not think that the sufficiency of the evidence upon any other feature of the case can be questioned and for that reason will confine our argument to the notice of claim for damages.

TWO CONTRACTS OF AFFREIGHTMENT.

Unquestionably the evidence shows that plaintiff shipped these cattle from Baker City under a contract which fixed the destination at Minidoka, Idaho. The bill of lading constituting the contract between plaintiff and defendant for this shipment is pleaded and set out *in haec verba* in the answer.

Plaintiff applied to the agent at Baker City for a through billing to South Omaha, that is, *a feed in transit*

rate, a contract which, if it had been granted, would have given plaintiff the right to stop at Minidoka for any length of time within the time limit (6 or 8 months) and reship at any time when he considered the market favorable. Under a feed in transit contract, plaintiff would have paid the local rate from Baker City to Minidoka and a notation (Tr. p. 93) would have been made on his bill of lading at Baker City which would have designated that it was a feed-in-transit contract and when plaintiff reshipped to South Omaha he would have been charged and would have paid the through rate from Baker City to South Omaha, less the local rate from Baker City to the point of reshipment. **BUT, NONE OF THESE THINGS WERE DONE.**

The agent at Baker City refused to give plaintiff a feed-in-transit rate, but persuaded the plaintiff to bill the cattle local to Minidoka. When the cattle were reshipped from American Falls to South Omaha there was a local billing and plaintiff was charged and paid the local freight rate. The fact that the railroad company *voluntarily* repaid to plaintiff six hundred dollars on account of the freight that he had paid on these cattle cannot change the original contracts of shipment even though this six hundred dollars taken from the freight rate paid by the plaintiff would leave a remainder that would be equal to what the freight rate from Baker City to South Omaha would have been. It was merely an **admission** on the part of the railroads that plaintiff should have received a feed-in-transit rate when he

applied for it at Baker City, but it does not change the fact that he did not get it. It merely emphasizes that fact.

Again, The bill of lading set out in defendant's answer shows that it is neither a through billing to South Omaha, nor a feed-in-transit billing to Minidoka, but merely a local billing with Minidoka as the point of destination; and constitutes the *first contract of affreightment*.

This contract became an executed contract and terminated on the evening of December 5, 1909, at American Falls, Idaho, by the defendant delivering the cattle to the plaintiff and the plaintiff paying the freight and taking the cattle from the possession of the defendant and placing them in a pasture and upon feed. If the cattle had been in as good condition as they would have been if they had received the usual treatment in transportation at the hands of the defendant in their shipment to this point, plaintiff would have kept them there upon feed until such time as the Omaha market appeared favorable, but their condition was such that it would require six weeks' feeding to get them over their soreness and injury and back to the condition in which they should have been when they arrived at American Falls and would have been except for defendant's negligence.

Consequently, at the expiration of four days plaintiff decided to get these cattle to market as soon as possible and shipped from American Falls to South Omaha. This constitutes *the second contract of affreightment*.

NO NOTICE OF CLAIM NECESSARY.

Under the allegations in the pleadings in this case and the facts as testified to by the witnesses it was not necessary for the plaintiff to give any notice whatever upon the arrival of this shipment to South Omaha of his claim for damages by reason of the negligence of the carrier.

An act of the carrier made it impossible for the shipper to give notice of his claim for damages at Minidoka.

We call the Court's attention to the fourth paragraph of the complaint which is a clear allegation that these cattle were first billed to the plaintiff as consignee at Minidoka in Idaho, and that afterwards upon their arrival at American Falls they were billed by the plaintiff to South Omaha. It is true that in this allegation the plaintiff alleges that the eventual destination of these cattle was South Omaha, but it is equally alleged that they arrived at South Omaha under two billings. The fourth allegation of the answer (Transcript, p. 32) alleges that the cattle were billed to Minidoka, Idaho, and the fifth allegation (page 35) that they were afterwards re-loaded and shipped from American Falls to South Omaha.

The only bill-of-lading which was pleaded and the only bill-of-lading which was in any way brought to the attention of the court during the trial of this action is the bill-of-lading set up in the answer of defendant

(transcript, pages 22 to 32). According to this bill-of-lading the cattle were consigned to J. G. Kidwell at Minidoka, which, under such bill-of-lading, was the point of destination. The ninth clause of said bill-of-lading appearing on page 28 of the transcript, is a clause requiring the shipper to put in claim for loss, and this clause says that he shall put in such claim for loss at the point of destination. the point of destination meaning, of course, the point of destination in the particular contract in which said clause appears, which point of destination in this contract was Minidoka, Idaho. Now, the cattle were never stopped at Minidoka, Idaho. On page 47 of the transcript the reason for this appears, and that is that there were no yards at Minidoka in which these cattle could be unloaded, and on page 48 of the transcript it appears that the cattle went right on to American Falls and never stopped at Minidoka at all; on page 51 of the transcript that the plaintiff never paid anything whatever for the transportation of the stock from Minidoka, the point of destination of the first bill-of-lading, to American Falls, which is east of Minidoka.

Now, it is very apaprent that if the railroad company ran this shipment through Minidoka without stopping that the plaintiff was thereby relieved from putting in his claim for loss and damage at Minidoka.

Upon the arrival of the stock at American Falls they were re-billed and consigned to South Omaha. This appears at pages 51 and 58 of the transcript as well as

being set forth in the pleadings, and there is not one line of testimony showing any of the stipulations of this bill-of-lading which was issued at American Falls. The bill-of-lading was not introduced in evidence and no evidence whatever as to its contents was offered or received.

The second and third paragraphs of defendant's further and separate answer and defense set forth rules and regulations affecting and governing the transportation and carriage of livestock governed by the tariff as filed with the Interstate Commerce Commission by the defendant herein. That these tariffs were filed and contained matter as alleged in the answer is denied by the second paragraph of plaintiff's reply to such separate answer and defense. No proof is offered that the defendant had ever filed such tariff, as alleged, with the Interstate Commerce Commission, and no proof was offered that this shipment moved from American Falls to Omaha under any such rules and regulations. The court does not take judicial notice of tariffs filed with the Interstate Commerce Commission or any stipulation in bills-of-lading made a part of that tariff. A party relying thereon must prove the same.

Hartwell Ry. Co. vs. Kydd, 74 S. E. 310.

The trial judge in granting a non-suit seemed to place considerable stress upon the fact that this was one continuous shipment from Baker City to Omaha, arriving at this conclusion because the stock were originally

destined for the Omaha market and from the fact that as appears on page 78 of the transcript the plaintiff received a refund on this shipment as if it had been a through billing. Admitting that it was one continuous shipment there is no contract requiring the giving of any notice except at Minidoka, and the fact that the plaintiff received a refund, as if this had been a through shipment, upon no theory that has occurred to us would extend the stipulations in the bill-of-lading issued at Baker City billing these cattle to Minidoka to require the shipper to comply with this bill-of-lading upon the arrival of the stock at South Omaha.

To reiterate, the plaintiff was relieved from giving notice of loss at Minidoka because the shipment never stopped there. He was not required to give notice at South Omaha under the evidence or the pleadings in this case.

NOTICE OF CLAIM WAS GIVEN.

It will be observed that Paragraph 9 of the bill of lading covering the shipment from Baker City to Minidoka does not require the claim for loss or damage to be in writing, for which reason an oral claim is sufficient and substantial compliance with this provision is all that is required.

Even those courts which hold that such a provision in a bill of lading is valid also hold that it must be *reasonable in order to be valid*. The purpose of such a

provision is to afford the carrier an opportunity to investigate claims for loss or damage to livestock before the evidence of such loss or damage is destroyed by the intermingling of such livestock with other stock. The courts that hold such a provision reasonable do so upon the ground that it prevents the carrier from being harrassed by unfounded claims for loss or delay to stock from being made after the evidence which would disprove such unfounded claim has been destroyed. And likewise enables the carrier to determine the extent of damage to such stock while the stock is in its possession.

If the purpose and only purpose of such a provision is to enable the carrier to make the necessary investigations so as not to be imposed upon by unfounded claims, then any claim or notice given the carrier which would enable such carrier to make such necessary investigation before the stock is intermingled with other stock at the point of destination is sufficient and as a consequence is a substantial compliance with Paragraph 9 of said bill of lading.

Is not plaintiff's notice sufficient for that purpose?

Plaintiff told the agent of the defendant at Shoshone that he was "going to put in a claim for sidetracking these cattle and handling them bad from Huntington until the time he left there" and the agent "notified them to that effect." When these cattle arrived at American Falls plaintiff said to the agent of the defendant at that place "there would be a claim against the company for

damages sustained and injury to these cattle". When plaintiff reached Laramie City, he "told the agent there that two steers jumped out the cars around Medicine Bowl, and that the Union Pacific would pay for them, and in addition to that there would be a claim for damages on the Short Line, possibly some of it on the Union Pacific going to South Omaha." At South Omaha, when plaintiff paid the freight upon these cattle, to the agent of the Union Pacific Railway Company, on the day on which they arrived there, he told said agent the same that he had told the other agents along the line, and said agent advised plaintiff to put in his claim at this end of the line, Portland, which he did after his return here.

Plaintiff's language in making his claim to these several agents of the carrier is neither technical nor grammatical, but it no doubt made up in force what it lacked in diction. That these agents understood perfectly what was meant is evidenced by the fact that the agent at Shoshone notified them (the proper officials of defendant) of plaintiff's claim.

Now, if plaintiff's notice to these several agents of the defendant and its connecting carrier was sufficient to enable them to inspect these cattle at the point of destination wherever that may be determined to be, before they were intermingled with other stock, then it is a sufficient compliance with Paragraph 9 of said bill of lading and defendant's motion for a nonsuit should have been denied.

SCOPE OF PARAGRAPH NINE.

Does Paragraph 9 of said bill of lading cover all the elements of damage alleged in the complaint and proven by the evidence?

We think not. There is an item of damages of \$340.00 paid by plaintiff (Tr. p. 94) for feed at Valley, Nebraska, which would not have been necessary if the cattle had been shipped through under proper conditions. The "loss, damage or detention" expressed in said paragraph 9 is evidently restricted to the stock described in the bill of lading, making it read thus: "unless claims for loss, damage or detention (*to said stock*) are presented" etc. The last sentence of said Paragraph 9 augments the force of this construction by providing that

"any carrier liable on account of loss or damage *to any of said stock*, shall have the benefit of any insurance that may have been effected thereupon."

This construction coincides with the opinion of the Missouri Court of Appeals in re *Klass Commission Co. vs. Wabash R. R. Co.*, 80 Mo. App. 164, 168, construing similar language in a bill of lading, as follows: "It is further contended that the trial court erroneously fixed plaintiff's damages on the basis of the market value of the clover seed at Toledo, whereas by the bills of lading it should have been based on such value at Columbia, the point of shipment. Aside from any special agreement, the undoubted rule is that the measure of damages

in such cases is the difference in the market value of the goods at the time and place where they should have been delivered and the market price at such place when they were in fact delivered. The sixth clause in the bill of lading, however, provides 'that the amount of loss or damage accruing to the owner of said goods, in so far as the same shall fall upon this or any connecting carrier shall be computed at the value or cost of said goods at the place and time of shipment, and that the railroad company or carrier paying such loss shall have the full benefit of any insurance that may have been effected upon or on account of said goods.' In our opinion this clause in the said contract was not intended to apply to damages of the nature here sued for. The 'loss' or 'damage' there referred to was meant to cover the *loss* or *damage* done to the goods themselves, and does not cover the owner's damage sustained by reason of a mere failure to carry and deliver the goods within a reasonable time. *The last sentence, providing that the carrier shall be entitled to the benefit of insurance taken, adds force to this construction."*

"The same answer may be made to the further claim that plaintiff is barred of his action because of his failure to give five days' notice of his claim for 'loss or damage' provided in the fifth clause of the bill of lading. Such loss or damages have no reference to what the shipper may have suffered by change in the market during the negligent delay in delivering the goods."

BURDEN OF PROOF.

Where rests the Burden of Proof?

Must plaintiff allege and prove that he has given the notice provided in Paragraph 9 of the bill of lading, or show that the provisions of such paragraph are unreasonable as applied to the particular conditions of this cause? Or, must the defendant allege and prove that the provisions of said Paragraph 9 are reasonable when applied to the circumstances of this case and that plaintiff has failed to comply with the provisions of such paragraph?

To begin with, we will admit that the decisions of our courts are not harmonious on this question. However, the weight of authority places the burden of proof upon the defendant.

In discussing this question Hutchinson on Carriers (3d ed.), Sec. 447, says:

“The weight of authority, however, sustains the view that such a stipulation is more in the nature of a limitation upon the owner’s right to a recovery, and that the *burden of proof is accordingly on the carrier* to show that the limitation is reasonable and that the owner omitted to present the notice in proper form or within the time stated”.

A like opinion is expressed in *Fort Worth and D. C. R. C. vs. Greathouse*, 82 Tex. 104, 17 S. W. 834, 838,

paragraph 8, from which we quote as follows:

“It is insisted by appellant that the court erred in overruling its demurrer to plaintiff’s petition, ‘because it does not appear from the allegations that plaintiff gave notice of his claim for damages to the nearest station agent before the cattle were removed from the place of delivery’. Without determining whether or not this provision in a contract, such as in this case, will in any case be enforced, we do not think the appellant has brought itself within the rules laid down in those cases that permit such contracts to be enforced, and that recognize their legality. When such provisions of a carrier’s contract are enforced, it is upon the assumption that such agreement is reasonable, when considered in the light of the subject matter of the contract and the circumstances and surroundings of the parties. To prove that such conditions in a contract are reasonable is a burden resting upon the carrier, who must show, by proper pleadings and evidence, the existence of facts that call for an enforcement of the condition. There were no pleadings and proof whatever upon this question coming from the carriers.”

In *Hatch vs. Minneapolis, St. P. & S. S. Ry. Co.*,

15 N. D. 491, 106 N. W. 1037, the Court says:

“The contract of shipment contained the following condition or stipulation: ‘The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stocks, he will give notice in writing of his claim therefor to some officer of said railroad company or its nearest station agent before said stock has been removed from said place of destination, and before said stock has been mingled with other stock.’

“The defendant contends that the complaint must state that the notice of injuries was given before the stock was removed from the place of destination, and before it was mingled with other stock.

* * * The condition or stipulation referred to is not strictly a condition precedent, and it is not part of the cause of action. The cause of action is complete before this condition becomes operative. The cause of action is not created by the contract of the parties. The law controls what facts shall constitute the cause of action. If the law should provide for the notice in the same statute, defining what the

cause of action should be, a different question would be presented. But the condition in this case is made by the contract of the parties and the cause of action is defined by the common law. Hence the condition cannot operate as a part of the cause of action. It was therefore an unnecessary allegation of the complaint. A cause of action was completely stated without it. The condition was a limitation upon the right of the plaintiff to maintain the action and pertained to the remedy. It was therefore a matter of defense to be raised by answer, if at all."

The following stipulation was contained in the bill of lading in the case of *Cox vs. Vermont Central Ry. Co.*, 170 Mass. 129, 49 N. E. 97, 101:

"The said company shall not, nor shall any carrier, person, or party aforesaid, be liable in any case or event unless written claim for loss or damage shall be made, to the person or party sought to be made liable, within thirty days' ", etc.

The Court says:

"The defendant relies upon the failure of the plaintiff to comply with the stipulation. The burden is on it, therefore, to

show that the stipulation was a just and reasonable one."

An examination of Paragraph 9 of the bill of lading here involved will disclose that it is not agreed therein that the presentation of the claim for loss or damage shall be a condition precedent to the right of action for such loss or damage; hence, the greater reason for holding that such provision is merely a limitation upon plaintiff's right to recover.

It is evident that the lower court in sustaining the motion for a nonsuit in this case assumed that the burden of proving a compliance with paragraph 9 was upon the plaintiff. This was an erroneous assumption, as the burden was upon the defendant to establish the non-compliance with said provision and the reasonableness thereof. Hence the motion for a nonsuit should have been overruled.

A FORMAL NOTICE WAS PRESENTED.

Finally, we submit that the evidence shows that formal written claim was presented to the defendant in Portland, Oregon. (Tr. pp. 60-61.)

"Q. I will ask you what this paper is, Mr. Kidwell, do you recognize it?

A. Yes, sir.

"Q. What is it? You may state what this is, Mr. Kidwell.

“A. It is a statement for claim that I put in against the O. S. L. and Union Pacific Railways for injuries and damages sustained to the cattle.

“Q. You put that in here in Portland, did you? A. I did. Yes, sir.

“Q. How did you come to put that claim in here at Portland?

“A. Well, I lived here and the agent at South Omaha—I had two steers killed on the Union, I took up with him, and he said take it up with the Claim Department; and he said the other claim might just as well be put in here; the main damage was on the Short Line.”

There is no objection made by the defendant in its pleadings to the sufficiency of this formal claim, hence its contents are immaterial.

The answer alleges, Par. VIII (Tr., pp. 34-35), that “plaintiff failed and neglected to give notice to this defendant of his alleged claim for loss and injury to said stock within ten days from the date of unloading of said stock,” etc., but the defendant cannot now be allowed to say that notice was not given within the time limited by the contract when the evidence shows that the agent at South Omaha to whom plaintiff paid the freight told plaintiff to put in his claim here (Portland).

These facts bring the case squarely within the opinion of the Supreme Court of the State of Washington in the case of *Reynolds vs. Great Northern Ry. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883, 893, where, in passing upon an identical provision in a bill of lading that Court said:

“Appellant also contends that respondent waived any claim for damages by failure to present a claim therefor within ten days from the date of unloading said stock, as provided in the contract. The evidence shows that no written claim was presented until June 2, 1903. The stock was unloaded on May 19, 1903. The contract does not require the claim to be made in writing, or in any specified form. The evidence shows that on the next day after the stock was unloaded respondent talked with the agent at Marian and told him that he wanted to put in a claim for loss, without mentioning any definite amount; that the agent told respondent to see the agent at Kalispell when he paid the freight; that respondent went to the agent at Kalispell to pay the freight and talked with him about the claim for damages, and the agent there directed respondent to see Mr. Jackson at Spokane; that two or three days prior to June 2, 1903, respondent

saw Mr. Jackson, who requested him to write a letter, and that he, Jackson, would thereupon attend to the matter right away. Thereupon on June 2, 1903, respondent wrote the following letter: * * *

“This claim for damages was within time under the contract. On the next day after the cattle were unloaded respondent notified appellant’s agent that he desired to make a claim for damages. Appellant’s agents cannot be permitted to put respondent off from one time to another and finally be heard to say that no claim was made in time; especially when respondent was asking to make a claim within the time limited.”

REGULAR TARIFF.

It has been heretofore shown that plaintiff paid local freight rate from Baker City to Minidoka, Idaho, and when the stock were reshipped from American Falls, Idaho, he paid the local rate from said point to South Omaha, Nebraska. It is likewise shown (Tr. p. 78) that two or three days after plaintiff returned to Portland, Oregon, plaintiff received a refund or rebate from the railroad company on account of the freight on these cattle of something over six hundred dollars. Plaintiff says (Tr. p. 78):

“Just two or three days after I got

here; there was a refund coming, six hundred and some dollars on this shipment on through billing, that is, they gave me the regular—made me pay just the price from Baker City to Omaha—*regular tariff*.”

The lower court seemed to think that this unsolicited (Tr. p. 68) rebate on the part of the railroad company had the effect of welding the two original contracts of affreightment into one and said court consequently held that the bill of lading issued at Baker City for the shipment to Minidoka controlled the relation between the plaintiff and the carriers all the way to South Omaha.

Admitting for the purpose of this argument only, that said refund could have had the effect of welding the two original contracts into one, we submit that the lower court left out of consideration one very important bit of evidence, namely, that this refund left the amount of freight paid by plaintiff **the regular tariff rate**. Plaintiff's words are (Tr. p. 78) “they gave me the regular—made me pay just the price from Baker City to Omaha—regular tariff.”

Now, the “regular tariff rate” is one thing, and a “reduced rate,” necessary to sustain a limited liability contract, is another. The plaintiff paid the regular tariff and there was, therefore, no consideration for the limited liability contract or bill of lading. This sustains the allegation of plaintiff's reply that there was no con-

sideration for the limited liability contract set up in defendant's answer.

This question has arisen a number of times in the State of Missouri in cases in which printed forms of bills of lading were used, reciting, among other things, that the rate charged for transportation was "at the rate of . . . tariff . . . per cwt." The opinion of the Supreme Court of the State of Missouri on motion for a rehearing in *George vs. Chicago etc. Ry. Co.*, 214 Mo. 551, 113 S. W. 1099, 127 Am. St. Rep. 690-693, contains a particularly lucid and logical discussion of the effect of the payment of the tariff rate upon a limited liability contract, from which we quote as follows:

"2. The point on which appellant chiefly relies in support of its motion for a rehearing is that in the contract under which the defendant undertook to transport the plaintiff's hogs it was expressly stipulated that in case of loss or injury to the stock the plaintiff should give defendant notice thereof in writing, the notice to be served within one day after the delivery of the stock at destination, and a failure to give such notice would bar a recovery of any claim on account of such loss or injury; and that there was no such notice given in this case. * * *

"We understand the proposition of the

counsel now to be that no consideration is necessary to support such a contract; in other words, the railroad company may charge the full tariff rate and yet limit its common-law liability in the manner now claimed. If there is a decision in this state going to that extent, the learned counsel have not brought it to our attention.

“The railroad company in making this contract did not proceed on the theory that it had the right to charge full tariff rate and at the same time limit its liability, but, on the contrary, the contract read in evidence expressly says that the shipper has agreed to it in consideration of the reduced rate. It seems to have been a printed form, and therefore presumably the one in common use. If the railroad company had been advised that it could limit its liability in this respect without any concession on its part, it is not likely it would furnish printed forms like this to its station agents. Railroad companies are generally well advised as to their legal rights.

“There can be no such thing as a contract without a consideration to support it. Our law primer told us that. If, therefore, the railroad company cannot obtain

this limitation on its liability, or this particular right which it now pleads in bar of the plaintiff's claim, otherwise than by contract, then it must give something to support the contract. If it is a concession that requires the shipper's consent before it becomes binding on him, then it is not binding, even though he does consent, unless he is paid for it. If, on the other hand, it is a condition that the railroad company may impose without the shipper's consent, then the law of contract has nothing to do with it; the railroad company may simply adopt it as a regulation and the shipper is bound to accept it. If it is to be classed under the head of a reasonable regulation which the railroad company may impose without the consent of the shipper, then the railroad company may refuse to receive the shipper's livestock for transportation on any other terms, though full tariff rate be tendered. No case has hitherto fallen under our notice in which a railroad company has claimed such a power.

"The right on which the defendant is here insisting is either a right it has independent of contract or one it has obtained by contract; if the former, the shipper's consent is of no consequence; if the latter,

his consent is of consequence only when there is a consideration to support it.

* * * * *

“The contract which defendant produced in evidence in this case recited that the price charged for the transportation was ‘at the rate of . . . tariff . . . per cwt.’ A shipping contract in exactly the same words in this respect was construed by this court in *Kellerman vs. Kansas City etc. R. R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828, to mean that the price charged was the full tariff rate.

* * * The highest rate that this defendant could have charged the plaintiffs for that shipment was the tariff rate, and that rate covered all that the carrier could demand for the performance of all its common-law or statute duty in respect of that shipment. Therefore, when the contract shows that that was the rate charged, it was vain to recite therein that it was ‘less than the rate charged for shipments transported at carrier’s risk’. The plaintiff is not here contending that the carrier assumed anything more in the way of a risk than that embraced in the duty which the law imposes upon a railroad company in

Wood vs. Southern Ry. Co.,
24 S.E. 704, 705.



the transportation of livestock carried at the regular tariff rate. * * *

“Those are the only decisions of this court bearing on this question to which our attention has been drawn, and from them we see that in every case where the contract relied on by the railroad company was not supported by a consideration in the way of a reduced rate it was held to be void, and the cases in which the contracts were sustained were those wherein their validity was questioned only on the ground that it was against public policy or that the stipulations were unreasonable or that the facts of the case excused the literal compliance with the terms.”

The authorities are particularly unanimous that the shipper must be given *a reduced rate—one lower than the regular tariff*—in order to bind him by the terms of a limited liability contract. *The regular tariff rate is where there is no limitation upon the liability of the carrier and where the regular tariff is charged, there can be no limitation upon the carrier's liability.*

It follows, therefore, that if there was but one shipment, one contract of affreightment upon which the regular tariff rate was charged, the limitations upon the carriers' liability contained in said bill of lading including said paragraph 9 are without consideration and void,

and the plaintiff was under no obligation to serve his claim for damages upon the defendant. The lower court, therefore, erred in sustaining the motion for non-suit.

SUMMARY.

We would summarize the argument of this brief into the following reasons why the judgment of the lower court should be reversed:

1. The first shipment was from Baker City, Oregon, to Minidoka, Idaho, and was made under the Limited Liability Livestock Contract or bill of lading set out in defendant's answer. Since the train bearing this shipment made no stop at Minidoka but went right through this station without stopping, the provision of said bill of lading requiring claims for loss, damage or detention to be presented at destination was unreasonable, and could not be insisted upon by the defendant, it having carried the stock beyond the point of destination, and that not at plaintiff's request, and consequently no notice was required, and the motion for non-suit should have been overruled.

2. Plaintiff notified the agents of the defendant at both Shoshone and American Falls of his intention to claim damages for the treatment this shipment had received and the agent at Shoshone notified the company of such claim. This was a substantial compliance with the requirement of the bill of lading and the motion for a non-suit should have been overruled.

3. The second shipment was from American Falls, Idaho, to South Omaha, Nebraska. The nature of this contract of affreightment is not disclosed, except that the cattle were billed at the local rate from American Falls to South Omaha. Hence, there was no limited liability contract covering this shipment and consequently no notice of claim for loss or damage could be exacted from plaintiff, and the motion for a non-suit should have been overruled.

4. When these cattle arrived at South Omaha, the plaintiff notified the agent of the Union Pacific to whom he paid the freight of his claim for damages on these cattle and was told to file his claim at this end of the line (Portland), which he did after his return to Portland. This was a compliance with the provisions of the Limited Liability Contract set up in the answer and the motion for non-suit should have been overruled.

5. The provision of the said bill of lading requiring claims for loss, damage and detention to be presented within ten days, etc., is a limitation upon plaintiff's right of action and not a condition precedent thereto, hence the burden of proving the reasonableness of such provision when applied to all the circumstances of this case as well as the burden of proving plaintiff's failure to comply therewith was upon the defendant, and the motion for a non-suit should have been overruled.

6. The item of \$340 expended by plaintiff for feed at Valley, Nebraska, is not included in the "loss, dam-

age or detention" to said stock contemplated by said provisions of the bill of lading; therefore, no notice was required as to this item of damage, and the motion for non-suit should have been overruled.

7. Under the adjustment of the rate on these cattle voluntarily made by the carriers after plaintiff had returned to Portland, by the return to him of over \$600.00 of the freight which he had paid them, he was charged the "regular tariff" through rate from Baker City to South Omaha. This being true, there was no consideration for the limited liability contract and the provisions requiring notice of claim of loss or damage was void, and said motion for a non-suit should have been overruled.

We submit, therefore, that the writ of error in this cause should be sustained, this cause reversed, the judgment of non-suit set aside and a new trial ordered.

Respectfully submitted,

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Index

	Page
Statement of case.....	1
Points and Authorities.....	5
Argument	
Defendant not liable for delay or shrinkage..	9
No recovery for feed bill at Valley.....	12
U. S. Supreme Court upholds stock contracts	14
No notice given as specified in contract.....	21
Points in Plaintiff's brief discussed.....	35
Conclusion	38

In the United States Circuit Court of Appeals for the Ninth Circuit

JAMES G. KIDWELL,

Plaintiff in Error.

v.

OREGON SHORT LINE RAIL-
ROAD COMPANY, a corpora-
tion,

Defendant in Error.

Brief of Defendant in Error

STATEMENT OF CASE.

This was an action originally commenced in the Circuit Court of the State of Oregon for the County of Baker to recover the sum of \$4927 on account of the alleged improper handling by defendant of a shipment of 398 head of cattle moving from Baker City, Oregon, to South Omaha, Nebraska, during the month of December, 1909. It is alleged in paragraph IV of the complaint that said shipment was shipped from Baker City, Oregon, to Minidoka, Idaho, it

being the intention of plaintiff as known to said defendant to continue the transportation of said cattle from Minidoka to South Omaha.

Plaintiff in error claims that by reason of the alleged improper handling of said shipment in transit said cattle sustained a shrink of seventy-two pounds per head more than the normal shrink, and that by reason of such improper handling by the defendant in error, the plaintiff in error was required to furnish said stock in transit with extra feed in the sum of three hundred dollars.

As a defense to said complaint defendant admitted that said shipment consisting of sixteen carloads was received by The Oregon Railroad & Navigation Company at Baker, Oregon, on or about the fourth day of December, 1909, and thereafter turned over to the defendant herein. Defendant further alleged that said shipment moved under and pursuant to the terms and conditions of the current livestock contract, a copy of which is set out in defendant's answer; that among other things defendant's tariff contained a provision to the effect that carriers do not undertake to carry livestock to arrive at any particular point on any particular market day or market hour, and that the rates named in the tariff were subject to the terms and provisions of the current livestock contract; that in said current livestock contract it is provided, among other things, no carrier shall be liable for any loss or damage to stock by causes beyond its control, shrinkage in weight, or any other

causes not directly the result of negligence on the part of the carrier; that the shipper expressly agrees to load and unload and care for said stock in transit; that plaintiff at the time he executed said stock contract agreed that "unless claims for loss, damage or detention are presented within ten days from the date of unloading of said stock at destination and before said stock has been mingled with other stock, such claim shall be deemed to be waived and the carriers and each thereof shall be discharged from liability."

It was further alleged that said cattle were wild and unruly and in poor shipping condition, that same were transported without unnecessary delay from Baker, Oregon, to Minidoka, Idaho, and there tendered to the plaintiff, but owing to the fact that a violent and unusual storm was raging and the further fact that it was almost impossible for plaintiff to purchase feed at Minidoka he refused to unload same at that point, and thereafter and at his request said cattle were transported to American Falls, at which place they were unloaded for feed, water and rest. After remaining at American Falls about ninety-six hours plaintiff reloaded said stock and shipped them to South Omaha, Nebraska, their ultimate destination.

It was further alleged that defendant and its connecting carriers had in full force and effect at and prior to the time said shipment moved a tariff of rates applying on livestock providing that a lower rate would be given to shippers who executed the livestock

contract and that plaintiff in this case secured the benefit of such lower rate; that upon arrival of such shipment at South Omaha they were in the same order and condition they were in when received by the Oregon Railroad & Navigation Company at Baker, except for the usual depreciation which all livestock in transit are liable to and depreciation due to the poor shipping condition, and the further fact that plaintiff and his agents while in charge of said shipment failed to give same proper and necessary attention; that plaintiff failed and neglected to give notice to this defendant of his alleged claim at destination as required by the livestock contract, and therefore whatever, if any, claim he may have had against defendant was barred by reason of his failure to comply with his contract.

As a reply plaintiff admitted execution of the livestock contract, movement of the cattle from Baker to American Falls, reloading of same at that place and final delivery at destination; alleged that said livestock contract was void for the reason that it was in violation and contravention of Section 7 of the Act of Congress known as the Carmack Amendment, 34 Stat., 595.

Said case was removed by defendant in error from the Circuit Court of the State of Oregon for Baker County to the Circuit Court of the United States for the District of Oregon, and thereafter and on July 7, 1912, said case was tried by a jury before Honorable R. S. Bean, and at the conclusion of plaintiff's testimony defendant interposed a motion for non-suit,

which motion was sustained by the court, and by reason thereof plaintiff in error is prosecuting this appeal.

POINTS AND AUTHORITIES.

I.

The evidence shows that whatever, if any, delay or shrinkage above the normal shrink the shipment may have sustained was caused by circumstances and conditions over which this defendant had no control and for which a carrier is never held liable as a matter of law.

Gulf Etc. Ry. v. Thomas, 138 S. W., 819-821.

M. K. & T. Ry. Co. v. Garrett, 87 S. W., 172.

Needham v. Boston Etc. Ry. Co., 74 Atl., 226.

St. Louis Etc. Ry. Co. v. Moon, 103 S. W., 1176.

St. Louis Etc. Ry. Co. v. Smith, 77 S. W., 28.

Tiller v. Chicago Etc. Ry. Co., 120 S. W., 672-675.

M. K. & T. Ry. Co. v. Rogers, 118 S. W., 738.

II.

The plaintiff in error cannot recover for alleged extra feed bill at Valley, Nebraska, for the reason that his witnesses testified that it was the custom to stop and feed cattle at this point in order to fill them up and rest them for the Omaha market. In any event, the defendant was in no wise connected with the delay at Valley.

Transcript of Record, pages 53, 69, 98, 99, 129.

III.

There is no evidence showing or tending to show that plaintiff's stock was injured through the negligence of this defendant while in transit, and for this reason a verdict for the plaintiff would be founded upon mere conjecture and speculation.

Goodman v. O. R. & N. Co., 22 Or., 14-28.

Manning v. Portland S. S. Co., 52 Or., 101.

Reidhead v. Skagit County, 33 Wash., 174-179.

Whitehouse v. Bryant Lumber Co., 50 Wash.,
563-566.

M. K. & T. Ry. Co. v. Garrett, 87 S. W., 172.

Patton v. Texas & Pacific Ry., 179 U. S., 658-
663.

IV.

Plaintiff failed to prove that he gave notice to the defendant of his alleged claim within ten days of unloading the stock at destination and before the stock had been intermingled with other stock as required by the contract of shipment.

M. K. & T. Ry. Co. v. Texas Etc. Ry., 33 Sup.
Ct. Rep., 397-401.

M. K. & T. Ry. Co. v. Hancock, 109 Pac., 223.

Frank L. Smith Meat Co. v. O. R. & N. Co.,
59 Or., 206.

Austin Stephensen Co. v. Southern Ry., 65 S.
E., 757-758.

Parrill et al v. Cleveland Etc. Ry., 55 N. E., 1026.

Atchison Etc. Ry. Co. v. Crittenden, 46 Pac., 1000-1001.

Metropolitan Trust Co. v. Toledo Etc. Ry. Co., 107 Fed., 628, 632.

Smith v. Chicago Etc. Ry., 87 S. W., 9, 10.

Houston Etc. Ry. Co. v. Mayes., 97 S. W., 318, 320.

St. Louis Etc. Ry. v. Pierce et al, 101 S. W., 760, 761.

Wichita Etc. Ry. v. Koch, 28 Pac., 1013, 1014.

Wood v. Southern Ry., 24 S. E., 704, 705.

Southern Ry. v. Adams, 42 S. E., 35, 36.

V.

It is not necessary that there be an independent consideration apart from that expressed in the shipping contract to support a stipulation of agreed valuation. The presumption is that sufficient consideration was given for the limitation, and unless plaintiff proves absence of consideration by clear and satisfactory proof the presumption of consideration will prevail.

Cau v. Texas & Pacific Ry., 194 U. S., 427, 432.

Arthur v. Texas & Pacific Ry., 139 Fed., 127, 130.

Schaller v. Chicago Etc. Ry., 71 N. W., 1042, 1044.

Miers v. Ry Co., 114 S. W., 1052.

Skelton et al v. Ry. Co., 110 S. W., 627.

Schroeder v. Turpin, 122 S. W., 1, 2.

VI.

Congress has manifested the purpose to take possession of the subject of transportation of property and liability of carriers by railroad of interstate shipments, and such laws and regulations supersede all state regulations or laws on the same subject, and the rule of law is now definitely and conclusively settled by the United States Supreme Court that agreed valuations and contracts limiting the carriers' common law liability will be upheld and enforced.

Adams Express Co. v. Croninger, 33 Sup. Ct. Rep., 148.

C. B. & Q. Ry. Co. v. Miller, 33 Sup. Ct. Rep., 155.

C. St. P. M. & O. Ry. Co. v. Latta, 33 Sup. Ct. Rep., 155.

Wells Fargo Co. v. Nieman Marcus Co., 33 Sup. Ct. Rep., 267.

Kansas City Southern Ry. v. Carl, 33 Sup. Ct. Rep., 391.

M. K. & T. Ry. Co. v. Harriman Bros., 33 Sup. Ct. Rep., 391.

ARGUMENT.

I.

THE EVIDENCE SHOWS THAT WHATEVER, IF ANY, DELAY OR SHRINKAGE ABOVE THE NORMAL SHRINK THE SHIPMENT MAY HAVE SUSTAINED WAS CAUSED BY CIRCUMSTANCES AND CONDITIONS OVER WHICH THIS DEFENDANT HAD NO CONTROL AND FOR WHICH A CARRIER IS NEVER HELD LIABLE AS A MATTER OF LAW.

The court will note by referring to page 164 of the Transcript of Record that the above was defendant's first ground on motion for non-suit.

In this connection we desire to call the court's attention to the fact that plaintiff testified, among other things, that while this shipment was in transit it was necessary for the stock train to be sidetracked at several different points owing to the fact that there had been a washout on the Southern Pacific between Reno and Sacramento and that by reason thereof all of the Southern Pacific passenger trains from the East to California points were being detoured over the lines of the defendant herein. (Transcript of Record, pages 44, 54, 70, 71, 87.) Of course, it goes without saying that a stock train could not expect to have the right of way over a passenger and mail train, nor could anyone contend that the defendant in this case was responsible for the violent and unusual storm causing washouts on the Southern Paci-

fic, thereby making it necessary to detour their passenger trains over this defendant's line of railroad.

The court will also note plaintiff testified that owing to the fact that during the month of December, 1909, a coal famine existed in the vicinity of Chicago; it was therefore necessary for the railroad companies to do everything they possibly could to transport cars of coal from Kemmerer and other coal mines to the East. Plaintiff's testimony shows that he was familiar with this condition and knew that the railroad companies were doing all they could to move these cars from Kemmerer to Chicago and vicinity. (Transcript of Record, pages 54, 70, 124.) Under these circumstances the defendant was required under the law and as an act of humanity to pick up coal cars at Kemmerer and move them in the first available eastbound freight train.

In this connection we would also call the court's attention to the fact that this shipment moved during the month of December, that considerable snow and ice and cold weather was encountered on the trip, and that, as stated by one of plaintiff's witnesses, we ran into an awful blizzard at Rawlins. (Transcript of Record, page 57.)

It is admitted by plaintiff's complaint and his testimony in this case that all cattle while being transported long distances by rail are bound to shrink and decrease in weight and value even though they are given the very best of care and attention, but plaintiff undertakes in this case to show that his stock on this journey suffered an abnormal shrink due to

the fact, among other things, that it was necessary to sidetrack the train upon which his stock was being carried. As a matter of fact, the evidence shows that plaintiff intended to ship his stock to Minidoka, Idaho, at which point he intended to feed them up for the Omaha market, but upon arriving at that place no pasturage of any consequence was available and hay was very scarce and expensive, and by reason thereof he moved the stock to South Omaha without fattening them up at this point for the Omaha market. After leaving Minidoka and American Falls, the shipment, as stated by plaintiff's witnesses, encountered a blizzard at Rawlins, Wyoming.

Taking all these facts into consideration, it seems clear to us that plaintiff's cattle would necessarily shrink to a greater extent than they would had they been moving in the middle of the summertime when grass and hay were plentiful and no snow, ice or blizzard would be encountered, and it would not be necessary to sidetrack stock trains on account of washouts on the Reno division, making it necessary to detour passenger trains over this defendant's line of railroad. Therefore, under this point we maintain that even assuming that plaintiff had shown that his stock had suffered an abnormal shrink, under such circumstances this defendant could not be held liable for same for the reason that it was caused, if at all, by facts and circumstances over which this defendant had no control.

We do not deem it necessary to discuss at length any of the decisions on this point, since it is elemen-

tary that a carrier is never held liable for injury caused by facts and circumstances over which it has no control. However, in this connection we call the court's attention to the fact that we have cited a number of cases sustaining our contention in this regard under Points and Authorities, number I, and therefore maintain that our first point in our motion for non-suit is well taken.

II.

PLAINTIFF CANNOT RECOVER FOR ALLEGED EXTRA FEED BILL AT VALLEY, NEBRASKA, FOR THE REASON THAT HIS WITNESSES TESTIFIED IT WAS THE CUSTOM TO STOP AND FEED CATTLE AT THIS POINT IN ORDER TO FILL THEM UP AND REST THEM FOR THE OMAHA MARKET. IN ANY EVENT DEFENDANT WAS IN NO WISE CONNECTED WITH THE DELAY AT VALLEY.

The court will note by referring to page 164 of the Transcript of Record that the above was defendant's second ground on motion for non-suit.

Plaintiff on cross examination (Transcript of Record, page 98) stated that Valley is about thirty miles from South Omaha, which, as the court will recall, was the ultimate destination of this shipment. He further testified that he held the cattle at Valley from ten A. M. on December 16th until six P. M. on December 19th, and then ran from there to South

Omaha. (Transcript of Record, pages 53, 56, 69); that he stopped the shipment at Valley for the purpose of feeding them up and getting them in better condition for placing on the Omaha market; that in the meantime plaintiff himself had gone to South Omaha to watch the market, and it was a mere matter of speculation how long he was going to leave the stock at Valley (Transcript of Record, pages 98, 98); that they were well fed up and in good condition after they were fed at Valley, and were put upon the Omaha market and looked pretty good; that the stopping of cattle at Valley to fill them up and get them into good condition for South Omaha market was a common practice among stock shippers (Transcript of Record, page 129).

Plaintiff alleges in paragraph VII of his complaint shown on page 7 of the Transcript of Record, that while said cattle were enroute he was compelled to pay for the maintenance of said cattle \$300 more than he would have been compelled to pay if the defendant had permitted them to be fed and cared for at proper times and places. In attempting to sustain this allegation plaintiff testified on page 98 of the Transcript of Record that while he was filling up the stock and resting them at Valley to get them in good condition to place on the South Omaha market he paid out the sum of \$300 for feed. As above stated, his testimony shows that this is the common practice and that he voluntarily held the cattle at Valley while he was at South Omaha watching the market, and finally, after the cattle had been sufficiently rested

and filled and the market at South Omaha had reached a point which was satisfactory to the plaintiff he then moved the cattle on to South Omaha and disposed of them.

We cannot conceive upon what theory of law or justice the plaintiff is entitled to recover any portion of this feed bill from the defendant when the testimony shows that he voluntarily incurred this bill at Valley for the express purpose of getting the stock in condition for sale on the Omaha market.

III.

CONGRESS HAS MANIFESTED THE PURPOSE TO TAKE POSSESSION OF THE SUBJECT OF TRANSPORTATION OF PROPERTY AND LIABILITY OF CARRIERS BY RAILROAD OF INTERSTATE SHIPMENTS, AND SUCH LAWS AND REGULATIONS SUPERSEDE ALL STATE REGULATIONS OR LAWS ON THE SAME SUBJECT, AND THE RULE OF LAW IS NOW DEFINITELY AND CONCLUSIVELY SETTLED BY THE UNITED STATES SUPREME COURT THAT AGREED VALUATIONS AND CONTRACTS LIMITING THE CARRIERS' COMMON LAW LIABILITY WILL BE UPHELD AND ENFORCED.

Plaintiff alleged in paragraph IX of his reply, as shown on page 38 of the Transcript of Record, that the limited liability livestock contract which is admitted was executed and governed the shipment in

question, was void as being in violation and contravention of Section 7 of the Act of Congress as amended commonly known as the Carmack Amendment, 34 Stat. at Large, 595 (now Section 20 of the act to regulate commerce). While this point was not particularly raised at the trial, plaintiff has again seen fit to make the same contention in paragraph II of his Points and Authorities as is shown on page 5 of plaintiff's brief. For these reasons we deem it necessary at this time to briefly refer to this point.

This is not a new question but has been decided many times by the courts. The leading case on the question is *Hart v. Pennsylvania Railroad Company*, 112 U. S., 331, 340, 341, in which it appears that Mr. Hart shipped five horses under a bill of lading which stated the horses were to be transported, among other things, upon the condition that the carrier assumed liability on the stock to the extent of one hundred dollars for each horse. One of the horses was killed and others were injured in transit, and during the trial it appeared that the animals were race horses and plaintiff offered to show damages based on their value amounting to over \$25,000. The testimony was excluded and plaintiff recovered a verdict for the sum of \$1200. On appeal it was

HELD: "Limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond to that value for negligence. The compensation for carriage is based on

the value. The shipper is estopped from saying that the value is greater. * * * There is no violation of a public policy. On the contrary it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus conflict with public policy if the shipper should be allowed to reap the benefit of the contract if there is no loss and to repudiate it in case of loss."

Normile v. O. R. & N. Co., 41 Or., 177, 188, was an action to recover the value of a mule which with other stock defendant agreed to transport from Portland, Oregon, to Astoria, Oregon. Upon arrival of the animals at Astoria, it is alleged that defendant negligently tied the mule to a small red plow; the mule, by moving its head, also moved the plow, became frightened, ran away and was injured. As a defense the defendant alleged that the animal was transported under a contract providing that the value of the stock did not exceed one hundred dollars per head, and that the recovery, if any, should not exceed that sum. Plaintiff obtained judgment for \$150, and in reversing the case on appeal it was

HELD: "It is in effect a representation that the horses and mules were not worth to exceed one hundred dollars per head and an express assent to the rate fixed as a proper charge for transportation based upon such valuation. The plaintiff cannot consistently claim a higher valuation upon the agreed rate of freight, and the contract is not in any proper sense one for the exemption of the defendant from the con-

sequences of negligence. In such a case the shipper is estopped to deny the value which he himself has deliberately fixed and agreed to as the real value of the property when it comes to a loss. Such stipulations in contracts are supported and upheld upon consideration of fairness as it relates both to the shipper and carrier. We are led to this conclusion by cases of palpable analogy and high authority."

Adams Express Co. v. Croninger, 33 Sup. Ct. Rep. 148, was an action to recover the full market value of a small package containing a diamond ring which was lost by the express company. The defendant alleged in its answer that it was engaged in interstate commerce and was subject to the Act to Regulate Commerce, that its rates were based on the declared value of the article transported, that plaintiff elected to have the package transported under its limited liability contract and could not recover in excess of the declared value. Plaintiff demurred to the answer as not containing a defense, and the demurrer was sustained. In reversing the case on appeal the United States Supreme Court

HELD: "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary (citing a number of cases). The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act

of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk, involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

“It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. (Citing a large number of cases.) * * *

“The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. * * *

“We therefore reach the conclusions that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.” The demurrer was therefore overruled and the case reversed.

Chicago, St. Paul & Minneapolis Ry. Co. v. Latta,

33 Sup. Ct. Rep., 155, was a very similar case, and the court reached the same conclusion in reversing and remanding this case for a new trial.

C. B. & Q. Ry. Co. v. Miller, 33 Sup. Ct. Rep., 155. In this case the United States Supreme Court adopted the same rule as laid down in the Croninger case and reversed the case upon the same grounds.

Kansas City Southern Ry. Co. v. Carl, 33 Sup. Ct. Rep., 391. This was a case involving the validity of the release of \$5.00 per hundredweight on a shipment of household goods. The United States Supreme Court upheld the right of the carrier to enter into such contracts, and expressly holds that there is nothing in the Carmack Amendment forbidding such contracts, and again reaffirms the rule laid down in the Croninger case.

M. K. & T. Ry. Co. v. Harriman Brothers, 33 Sup. Ct. Rep., 397. This was an action to recover damages for the alleged negligent killing of a shipment of cattle by derailment of one of the defendant's trains. The shipment moved under the terms and provisions of a livestock contract very similar to the one in controversy in the case at bar. The lower court permitted a recovery for the full value of the shipment notwithstanding the limitations contained in the contract. In reversing the case it was

HELD, in effect, that there was nothing in the Interstate Commerce Act which prevented the carrier from entering into such a contract; *that the reasonableness of its provisions could not be attacked*

in any court; that the Interstate Commerce Commission was the only body which had authority to pass upon the reasonableness of the same. The limitations in the contract were sustained and the same rule adopted as laid down in the Croninger case.

Previous to the above decisions there has been more or less conflict in the different state decisions concerning the right of a carrier to enter into these contracts, but such conflict was more apparent than real, and due to the fact that the different courts failed to note the distinction between a strict limitation for liability for negligence and the agreed valuation in case of loss. But these recent decisions by the United States Supreme Court have removed all of this difficulty and settled beyond any controversy that the carrier has a right to enter into such contracts and that same will be upheld and enforced.

However, there is still another reason why the Carmack Amendment can have no application to this shipment, and that is that Section 7 of the Act of Congress as amended, 34 Statutes at Large, page 595 (now Section 20 of Act to Regulate Commerce), is only applicable to the initial carrier and plainly states that no rule, receipt or regulation shall change the liability *hereby* imposed. An examination of the language of the act will show that the only liability *hereby* imposed is, that the initial carrier upon receipt of goods shall be responsible through to destination regardless of whether or not the loss occurred upon its or its connecting carrier's line. It is perfectly clear, therefore, that under the recent decisions

of the United States Supreme Court there is nothing in the Carmack Amendment in any wise affecting the right of the common carrier to enter into limited liability livestock contracts.

IV.

PLAINTIFF FAILED TO PROVE THAT HE GAVE NOTICE TO THE DEFENDANT OF HIS ALLEGED CLAIM WITHIN TEN DAYS OF UNLOADING THE STOCK AT DESTINATION AND BEFORE THE STOCK HAD BEEN INTERMINGLED WITH OTHER STOCK, AS REQUIRED BY THE CONTRACT OF SHIPMENT.

By referring to Section 9 of the livestock contract, as shown on page 28 of the Transcript of Record, the court will note that it provides as follows:

“9. Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. * * *”

By referring to page 165 et seq. of the Transcript of Record, it will be seen that Judge Bean, in granting defendant's motion for a non-suit, discussed this feature of the case at length, and arrived at the conclusion that the non-suit should be granted for the reason that plaintiff did not comply with this section of the contract.

Plaintiff contended upon the argument for a non-

suit, and is now attempting to claim in his brief, that he complied with this section and gave notice of his claim at destination, as required by Section 9 of the livestock contract. The testimony in regard to plaintiff's compliance with Section 9 is contained on page 59 of the Transcript of Record, where he states in effect that he told the agent at Shoshone that *he was going to put in a claim*, and other similar remarks made to different railroad employes between Shoshone and South Omaha, and later on, on page 60, plaintiff testified that he put in a claim in Portland, Oregon.

Plaintiff, on page 33 of his brief, seeks to justify the right of plaintiff to put in a claim to the Oregon Railroad & Navigation Company, at Portland, Oregon, for the alleged reason, as he claims, that some agent at South Omaha told him to take it up with the claim department, as shown on page 61 of the Transcript of Record. As was stated by Judge Bean, in passing on this point, there was no testimony or contention that the plaintiff complied with Section 9 of the livestock contract by making claim at South Omaha within ten days after the arrival of the stock, before they had been intermingled with other stock, and the fact that some agent or employe of the defendant, while the shipment was in transit, was notified that the plaintiff was going to put in a claim, or the fact that somebody's agent—whether Union Pacific agent, agent of the Stock Yards Company, or agent of the commission firm, the evidence does not show—told the plaintiff to take up the matter with the claim

department, without designating any particular claim department, certainly does not authorize a waiver of Section 9 and justify the plaintiff in waiting until the stock had been intermingled with other stock and then several weeks afterwards put in a claim 2000 miles from destination, with the Oregon Railroad & Navigation Company at Portland, Oregon. As a matter of fair dealing and justice between man and man, the defendant is entitled to a reasonable notification of a claim for loss and damage in a case of this kind, whether it is so specified in the livestock contract or not, for the reason that it is absolutely impossible for a railroad company to check up and determine whether or not plaintiff has actually sustained any damage after the shipment has arrived at destination and is sold and butchered. The courts have recognized the justice and reasonableness of such a provision in livestock contracts and have uniformly held that unless the plaintiff complies with such requirements he cannot recover. We desire to refer briefly to a few of the many cases on this subject.

Smith Meat Co. v. O. R. & N. Co., 59 Or., 206, 209. This was a case in which the plaintiff was seeking to recover damages on a shipment of cattle moving from North Powder, Oregon, to Portland, Oregon. The contract governing this shipment contained identically the same clause in regard to the presentation of claims as is contained in the contract in the case at bar. In upholding the validity of this clause the court, among other things,

HELD: "The stipulation that a claim of injury shall be presented within ten days and before the stock shipped shall have been mingled with other stock, is a reasonable stipulation on its very face. Transportation companies can only do business through employes, and the location of these, as well as the time of their employment, is subject to change. It is only fair that in cases of this character the corporation should be seasonably notified that a claim for damages would be insisted upon, in order that a careful inspection of the animals and timely inquiry into the conditions attending their transportation may be investigated and the actual facts ascertained. This is not a stipulation exempting the carrier from liability for negligence, but one giving it an opportunity to ascertain whether its servants have been in fact negligent."

M. K. & T. Ry. Co. v. Harriman Brothers, 33 Sup. Ct. Rep., 397. This case involved a shipment of cattle which moved under the terms and provisions of a limited liability livestock contract, which contained a provision, among other things, to the effect that no suit shall be brought after a lapse of ninety days from the happening of any loss or damage, any statute of limitation to the contrary notwithstanding. The lower court held that this stipulation was void and a verdict was returned in favor of the plaintiff. In reversing the case the court, among other things,

HELD: "The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence

from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. * * * Such limitations in bills of lading are very customary and have been upheld in a multitude of cases (citing cases). * * * The provision requiring suit to be brought within ninety days is not unreasonable and the case is therefore reversed.”

M. K. & T. Ry. Co. v. Hancock & Goodbar, 109 Pacific, 223. This was an action to recover damages for injuries alleged to have been sustained by plaintiff while shipping two carloads of cattle. Shipment moved under a limited liability livestock contract, which contained, among other things, the following stipulation: “That as a condition precedent to the shipper’s right to recover any damages for any loss or injury to the livestock shipped, resulting from the carrier’s negligence, including delays, the shipper shall, within thirty days after the happening of the injuries complained of, file with the freight or station agent of the carrier his claim for damages, giving the amount thereof, and that no suit shall be brought against the carrier after a lapse of ninety days from the happening of the injury.”

HELD: “The stipulation is reasonable and valid and is not against public policy. The court adopts and follows the opinion in the case of *Southern Express Co. v. Caldwell*, 21 Wall. 264.”

Austin-Stephenson Co. v. Southern Ry. Co., 65 S. E., 757, 758, discussing the legality of a clause in a livestock contract, which read as follows:

“That as a condition precedent to any right to recover any damages for loss or injury to said livestock, notice in writing of the claim thereof shall be given to the agent of the carrier actually delivering said livestock, wherever such delivery may be made, and such notice shall be so given before said livestock is removed or intermingled with other livestock.”

HELD: “The carrier does a large business, covering a vast extent of territory, and to allow suits to be brought against it without such notice, at any length of time, when the evidence of the true nature of the transaction has been lost or obliterated and there is no sufficient opportunity afforded of ascertaining the truth of the matter, would be to surrender the carrier, bound hand and foot and in a helpless condition, to the tender mercies of the shipper, and subject it to the payment of almost any kind of a claim which his caprice or avarice might tempt him to assert. * * * The law will not tolerate such an imposition which might follow a denial of the validity of this clause in the contract. * * * A stipulation requiring a consignee of cattle to present any claim for damages at the time the cattle were received and before they were unloaded and mingled with the other cattle, has been held to be reasonable and valid.”

Parrill et al. v. Cleveland etc. R. R. Co., 55 N. E., 1026. In this case certain livestock was transported

under a livestock contract containing the following stipulation :

“No claim for damages which might accrue to the shipper under his contract, shall be allowed or paid by the carrier or sued for in any court by the shipper, unless a claim for such loss or damage should be made in writing, verified by the affidavit of the shipper, or his agent, and delivered to the freight claim agent of the carrier at his office in Cincinnati, Ohio, within five days from the time of the removal of the stock from the car.”

In sustaining the validity of this limitation the court said: “Where there is a special contract providing a necessity for reasonable notice of claim, the giving of such notice or the presentation of such claim being a condition precedent, it is a part of the plaintiff’s cause of action to show performance of this precedent obligation on his part or to show a waiver of performance or of strict formality.” (Citation.)

Atchison Etc. Ry. v. Crittenden, 44 Pac., 1000, 1001. In this case the special limited livestock contract had the following provision:

“As a condition precedent to the shipper’s right to recover any damages for loss or injury to said stock, he will give notice in writing of his claim therefor, to some officer of said party of the first part, or its nearest station agent, before said stock is removed from its place of destination above mentioned, or from the place of delivery of the same by said party of the second part, and before said stock is mingled with other stock.”

In upholding the validity of this clause the court, among other things, said: "These provisions of the contract are just and equitable. The company is entitled to a written notice that the shipper claims damages, so as to permit the company to have a thorough investigation made of the nature of the claim and the condition of the stock, before the stock is removed from its premises, or before it is mingled with other stock, so as to render its identification difficult. * * * Failing to comply with the terms of this contract in regard to giving notice, the shipper cannot recover."

Metropolitan Trust Co. v. Toledo Etc. Ry., 107 Fed., 628, 632. The livestock contract contained the following provision:

"That no claim for damages which may accrue to said second party under this contract, shall be paid by the said first party or sued for in any court by the said second party, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said second party, or his or their agent, and delivered to the general freight agent of the said first party at his office in the City of Evansville, Indiana, within thirty days from the time said stock is removed from said cars, and that if any loss or damage occurs upon a line of connecting carrier, then the carrier shall not be liable unless a claim be made in like manner, and delivered in like manner, to some proper officer or agent of the carrier on whose line the loss or damage occurs."

In upholding this provision of the contract the court held that such a stipulation is valid and reasonable, and quotes with approval a number of cases sustaining his position.

Smith v. Chicago Etc. Ry., 87 S. W., 9, 10. The contract contained the following provision:

“As a condition precedent to any damages or any loss or injury to livestock covered by this contract, the second party (plaintiff) will give notice in writing of the claim therefor to some general officer, or to the nearest station agent of the first party at destination, * * * and before such stock is mingled with other stock, such written notification to be served within one day after delivery of stock at destination. * * * That a failure to comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.”

In upholding this clause of the contract the court, among other things, said: “It is a further contention that plaintiff was not entitled to recover by reason of his failure to give notice as required by the contract, of his damages. It is conceded that no such notice was given, and it is not a matter of dispute but what the terms of the contract as to such notice included damages resulting from the death or shrinkage of the hogs. In such instances the giving of such notice is a prerequisite to the right of recovery.” (Citations.)

Houston Etc. Ry. Co. v. Mayes, 97 S. W., 318, 320. The contract had a clause which was substantially as follows:

“As a condition precedent to the shipper’s right to recover damages, he must give written notice to some general officer or agent of the company, of the loss, damage or injury sustained within ninety days of unloading the stock at destination.” It was held that the stipulation was reasonable and should be enforced.

St. Louis Etc. Ry. v. Pierce et al, 101 S. W., 760, 761. The livestock contract contained a clause as follows:

“That as a condition precedent to a recovery for any damages for delay, loss or injury to livestock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer, or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims.”

In upholding the validity of this stipulation, the court says: “This provision of the contract is reasonable and binding. The stock was unloaded and sold within the time stipulated for the giving of the notice, and it imposed no unreasonable terms upon the plaintiffs in requiring them to give notice within that time

of their intention to claim damages. The giving of the notice within the time named was according to the stipulation and condition precedent to the right of recovery, and the burden of proof was upon the plaintiffs to show that they had given the notice."

Wichita Etc. Ry. v. Koch, 28 Pac., 1013, 1014. The shipping contract in this case provided as follows:

"That as a condition precedent to his right to recover any damages for loss or injury to said hogs, he will give notice in writing of his claim therefor to some officer of said party of the first part or its nearest station agent, before said stock is removed from the place of destination above named, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock."

The court held that such stipulation was reasonable, just and valid, and cites and quotes from a large number of cases to support his decision.

Wood v. Southern Ry., 24 S. E., 704, 705. The shipping contract in this case had the following stipulation:

"That as a condition precedent the shipper will give notice in writing of his claim for damages to the agent of the railroad company, actually delivering said stock to him * * * before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same, and before said stock is intermingled with other stock."

The court upheld this stipulation, and among

other things said: "The object of such provisions in contracts like this, is that the defendant may have notice of the shipper's claim for damage in time to investigate the matter before the cattle are carried off and scattered, so that it cannot do so, or cannot do so with the same facility and satisfaction that it could at the place of delivery."

Southern Ry. Co. v. Adams, 42 S. E., 35, 36. This contract contained the following stipulation:

"It is further agreed that as a condition precedent to the right of the owner to recover any damages for any loss or injury to said livestock, he will give notice in writing of his claim therefor to the agent of the railroad companies actually delivering said stock to him * * * before said stock is removed from the place of destination * * * and before said stock is intermingled with other stock."

In passing on this the court held that such stipulation is reasonable and binding upon the parties, and quotes approvingly from the decision of the United States Supreme Court in the case of *Express Co. v. Caldwell*, 21 Wall., 264, 268, as follows:

"The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitation. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim he may delay his suit. *It may also be remarked that the contract is not a stipulation*

*for exemption from responsibility for the defendant's negligence, or for that of their servants. * * * A common carrier is always responsible for his negligence, no matter what his stipulations may be, but an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is altogether of a different character; it contravenes no public policy; it excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity with the strictest rules of the common law ever required. * * **

As before stated, the evidence conclusively shows that no claim was ever made by the plaintiff at destination within ten days after the unloading and before the stock had been intermingled with other stock. It must be apparent to the court in this class of cases that it is absolutely impossible for the defendant to investigate and determine whether plaintiff in error's stock was injured, unless some such notice is given to the defendant in error, thereby making it possible for it to properly investigate the claim. Especially is this true where the claim is for abnormal shrinkage, which at best is a very speculative and conjectural proposition. However, as before stated, plaintiff in error specifically agreed by the terms of his contract that unless his claim was presented within ten days after the arrival of stock at South Omaha and before the stock was intermingled with other stock his claim would be waived, and certainly with-

out some notice defendant could not determine whether plaintiff was going to claim damages for alleged shrinkage or delay or rough handling or loss of the cattle, or whether he claimed damages for any reason.

We have seen fit to quote at length from a number of these cases, not because we ever had any doubt as to the validity of such stipulation, but for the reason that plaintiff in error has very earnestly contended before the lower court that said stipulations were void and against public policy, as an attempted limitation of the carrier's liability for its own negligence, but this can no longer be considered an open question since the recent decision of the United States Supreme Court upholding limited liability livestock contracts. We therefore contend that whatever, if any, right of recovery plaintiff in error in this case had, is barred by his failure to give defendant in error notice of his claim for damages as he agreed to do in the ninth clause of the shipping contract, and particularly is this true in this case for the reason that defendant in error had no notice of plaintiff in error's claim, or the nature of it, until long after the stock had been sold, intermingled with other stock and slaughtered, thereby making it absolutely impossible for defendant in error to determine whether or not there was any injury to said stock. For these reasons we submit the motion for non-suit was properly sustained.

PLAINTIFF IN ERROR'S BRIEF.

On page 17 of his brief, plaintiff in error makes the contention that there were two contracts of shipment, one reading from Baker, Oregon, to Minidoka, Idaho, and another from Minidoka, Idaho, to South Omaha, and then attempts to show that the shipments moved under the local rates applicable between these points, and that, as a matter of fact, the plaintiff did not secure the benefit of the lower rate in consideration of executing said livestock contract.

We are at a loss to know why or upon what theory plaintiff in error feels that he is justified in making such contention. He alleges in paragraph IV of his complaint, as shown on page 3 of the Transcript of Record, that the cattle were shipped to Minidoka, it being the intention of plaintiff, as known to the defendant, to continue the transportation of said cattle from Minidoka to South Omaha. Then again, plaintiff testified on page 68 of the Transcript of Record that he received through billing from Baker to Omaha, and that it was a through shipment with the right, as plaintiff testified on page 96 of the Transcript of Record, to stop the cattle at Minidoka for not to exceed 120 hours; that he first intended to take advantage of the feed in transit rate, but later changed his mind and took advantage of the through rate and that refund of over six hundred dollars was made to him on this basis, as shown by pages 96 and 97 of the Transcript of Record, but be that as it may, the United States Supreme Court has held in the case of *Cau v. Texas & Pacific Ry.*, 194 U. S., 427, 432:

“It is not necessary that an alternative contract be presented to the shipper for his choice. A bill of lading is a contract, and knowledge of its contents by the shipper will be presumed, and provision therein against liability for damages by fire is not unjust or unreasonable. It is not necessary that there be an independent consideration apart from that expressed in the bill of lading to support a reasonable stipulation of exemption from liability.”

To the same effect see *Arthur v. Texas & Pacific Ry. Co.*, 139 Fed., 127, 130.

On pages 28 et seq. of plaintiff's brief he makes the contention that the burden of proof is upon the carrier to prove the reasonableness of the stipulations contained in the livestock contract, then proceeds to cite some of the older authorities to that effect.

While this may have been the law at one time, plaintiff in error apparently overlooked the fact that since the passage of the Interstate Commerce Act as amended, the United States Supreme Court has held in cases without number that the tariff rates, rules, regulations, classifications and practices affecting classifications which are published and filed with the Interstate Commerce Commission, as required by law, are conclusively reasonable to everyone except the Interstate Commerce Commission, and a moment's reflection will show the justness of such a rule; for if it were otherwise, one inferior court might hold a rate or a regulation reasonable and another court hold the same rate or regulation unreasonable, and

by reason thereof it would be impossible for the carrier to abide by its published tariffs or shippers to know what rates, rules or regulations were in force and effect; so the framers of the Act to Regulate Commerce wisely placed the exclusive jurisdiction as to reasonableness of rates, rules and regulations with the Interstate Commerce Commission. Hence, it necessarily follows that it makes no difference in this kind of a case whether the tariff provisions relating to the presentation of claim at destination within ten days of unloading is reasonable or otherwise, so long as it remains in the tariff and is not canceled by order of the Commission.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 442.

Illinois Central Ry. Co. v. I. C. C., 206 U. S., 441, 464.

Meeker v. Lehigh Valley Ry. Co., 162 Fed. 354, 359.

Without unduly prolonging this brief, defendant in error contends that the motion for non-suit in this case was properly granted for the following reasons:

First. Whatever, if any, damage was caused to the shipment in question was sustained by causes and circumstances over which this defendant had no control.

Second. Plaintiff in error voluntarily unloaded his stock at Valley for the purpose of filling them up to place them on the Omaha market.

Third. The contract in evidence in this case is valid and binding and will be upheld as shown by the recent United States Supreme Court decisions.

Fourth. Plaintiff in error cannot recover in this action for the reason that he failed to give notice to the defendant or its agents at South Omaha before said stock had been unloaded and intermingled with other stock as he agreed to do under Section 9 of the livestock contract.

For the above reasons, we submit that the judgment of the lower court in sustaining defendant's motion for a non-suit should be affirmed, with instructions to dismiss the action.

Respectfully submitted,

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A. C. SPENCER,

W. A. ROBBINS,

Attorneys for Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit

JAMES G. KIDWELL,
Plaintiff in Error,

vs.

OREGON SHORT LINE RAIL-
ROAD COMPANY, a corpora-
tion,
Defendant in Error.

No. 2247

Petition for Rehearing of Plaintiff in Error

Now comes the plaintiff in error herein and respectfully presents this his petition for rehearing.

In presenting this petition for rehearing we do so upon the ground that **we believe that this action was decided both in the court below and in this court upon a ground that was unnecessary for either court to consider at all** because the point herein advanced and argued in our opening brief obviates the neces-

sity of its consideration. The non-suit was granted in the court below for the reason that the plaintiff in error had not given notice of claim for damages assumed to be required under the evidence and pleadings in this matter, and the decision of the lower court was affirmed upon the same ground. We do not propose to question at this time the decision that the notice given was insufficient, but we do **most earnestly maintain that under the pleading and proof in this matter no notice whatever was necessary** and that the non-suit was therefore improperly allowed. We made this point on pages 20 to 23 of our opening brief and the point there raised was not answered in any way by the defendant in error in its brief and was not noticed by this court in its opinion.

We will first briefly call the court's attention to the allegations in the pleadings in this case. The fourth allegation in the complaint alleges in substance the delivery of the cattle by the plaintiff to the initial carrier at Huntington, Oregon, and alleges that the property was delivered for transportation over the line of railroad of the defendant and over the Union Pacific road to South Omaha, to such intermediate point upon the line operated by the defendant and the Union Pacific Railroad Company as the plaintiff might thereafter designate said stock to be consigned to plaintiff at such point of destination, the point of destination referred to, as we understand the matter, being the intermediate point between Huntington and South Omaha. The allegation

then is that these cattle were billed to plaintiff as consignee at Minnekoda, Idaho, it then being alleged that the intention of plaintiff to continue the transportation of said cattle from Minnedoka to South Omaha was known to the defendant. The allegation then further continues that the cattle were thereafter billed from American Falls to South Omaha, (American Falls being a station on the line of defendant's road East of Minnedoka, the point to which the cattle were first billed), and it is clear under the allegation in this paragraph that the cattle reached South Omaha under two billings, one from Huntington to Minnedoka, and one from American Falls to South Omaha. (Transcript, page 2). The fourth allegation of the answer (Transcript, page 32) alleges that the cattle were billed to Minnedoka, Idaho, and the fifth allegation (Transcript, page 35) that they were afterwards reloaded and shipped from American Falls to South Omaha.

The answer of the defendant (Transcript, pages 22 to 32) sets forth the bill-of-lading under which these cattle moved from Huntington to their destination under that bill-of-lading; that is, Minnedoka, Idaho.

We herewith respectfully call this court's attention to the fact that there is nothing in the pleadings or evidence showing any of the stipulations of the bill-of-lading from American Falls to South Omaha, and it was assumed by the court in its decision that the bill-

of-lading from American Falls to South Omaha contains some stipulation requiring claim for loss or damage to be put in within ten days after the arrival of the stock at South Omaha. It is true that the second and third paragraphs of defendant's further and separate answer and defense set forth certain rules and regulations effecting the transportation and carriage of livestock as governed by the tariff filed with the Interstate Commerce Commission. That these tariffs were filed and contain matter alleged in the answer is denied by the second paragraph of plaintiff's reply to such separate answer and defense. No proof was offered that the defendant had ever filed such tariff as alleged and no proof was offered that the bill-of-lading or contract under which these cattle were shipped from American Falls to South Omaha contained any stipulation or provision requiring any notice whatsoever.

In the case of Hartwell Ry. Co. vs. Kydd, 74 S. E., 310, it is decided that the court does not take judicial notice of tariffs filed with the Interstate Commerce Commission, and that a party relying thereon must prove the same. No proof having been offered we do not think that this court can properly take notice of any stipulation or conditions which might have been contained in the shipping contract under which this stock moved from American Falls to South Omaha.

To briefly reiterate, there is one bill-of-lading, the contents of which are proven and which may be

properly considered in determining this case, and that is the bill of-lading from Huntington to Minnedoka. There is no proof whatever that the shipping contract issued from American Falls to South Omaha required any notice of damage to be given to any one at any time.

The honorable trial court in granting the non-suit (Transcript, page 168) uses the following language: "When the stock arrived at Minnedoka which is now claimed to be the end of the first shipment, the consignee refused to unload them; refused to take them off the train. If that was the end of the contract it was his duty to do that * * * * * But he refused to unload them at that place because there was no proper stock-yard for rest and feed." In coming to this conclusion the trial court was in error. The only evidence touching upon this matter appears on pages 47 and 48 of the transcript. The testimony in brief is this: That the cattle arrived at Shashone at 3:30 o'clock a. m. on December 5th (Transcript, page 44); that there was not sufficient facilities there for unloading the cattle for feed, rest and water; after an endeavor by the employes of the defendant to unload the cattle at Shoshone (which is West of Minnedoka) it was decided to run these cattle on. It was then discovered or first made known to the plaintiff that there was no yard at Minnedoka, it having burned down. A telegram was then sent to the Superintendent or Division Superintendent, or some one in authority, and the

engine was coupled to the train. We quote now from page 48: "When I (plaintiff in error testifying) started I said to the agent, I says: 'No yards at Minnedoka, so this man says.' 'Well,' he says, Minnekoda is where they are billed and Minnedoka is where they will go.' That is all there was to it. The cattle went on to American Falls, never stopped at Minnedoka at all. The railroad men couldn't unload these cattle at Shoshone; they didn't have a chance to. We left Shoshone at 11:15 a. m. on December 5th, and arrived at American Falls just a few minutes after four o'clock that evening."

Now, we desire particularly to call the court's attention to the bill-of-lading which is proven. That is, the bill-of-lading from Huntington to Minnedoka. This bill-of-lading says that notice of loss, etc., shall be put in at the point of destination. The point of destination is the point in this bill-of-lading; that is to say, Minnedoka. The evidence which we have quoted above is the only evidence showing the movement of these cattle from Shoshone to American Falls and is conclusive that the cattle were **rushed through the point of destination without any stop whatever, and for the reason that the railroad company had not provided any facilities for unloading these cattle at the point of destination.** On page 51 of the transcript it further appears that the plaintiff paid nothing whatever for the transportation of these cattle from Minnedoka to American Falls. Now, it seems clear to us as a matter of principle if there were no decisions whatever to support our

view, that where a shipment is taken by the carrier beyond the point of destination in the bill-of-lading that a stipulation for the giving of notice at the point of destination is nullified.

We call the court's attention to the case of Cleveland C. C. & St. L. Ry Co. vs. C. M. A. Potts & Company, 71 N. E., page 685. See pages 688 and 689 and cases therein cited, holding that any deviation from the contract of carriage will deprive the carrier of limitations of liability in the contract.

It will be further noticed that in this particular instance the failure of the carrier to deliver the stock at the point of destination was the result of its not having proper facilities there to take care of the cattle. We call the court's attention to the evidence of plaintiff on pages 41 and 42 of the transcript to the effect that at the time these cattle were billed from Huntington to Minnedoka that he was led to believe by the agent for the railroad company that there were stock-yards at Minnedoka and facilities for unloading these cattle, which evidence is not contradicted. We believe that a consideration of the matters pointed out herein will convince this court that there is no evidence that any notice was required at South Omaha and that the act of the defendant in transporting these cattle through Minnedoka without even stopping, which act was rendered necessary by its own fault, would certainly relieve this plaintiff from giving notice of damage at Minnedoka, the point of destination named in the bill-of-lading, be-

ing the only contract of shipment proven, and if we are right in these matters this case has been decided upon a point which had no place whatever in the case.

We will add that there are two other phases of this case which are referred to in the brief of the defendant; also in the opinion rendered by the trial judge. We do not see, however, that they militate at all against the propositions we have advanced. The first of these is that the plaintiff informed the initial carrier that the stock was intended for the market at South Omaha; that he desired a through shipping with a stop-over privilege. This, however, the agent of the initial carrier said he could not give but would ship the cattle to some point in Idaho at a local rate and that the matter of tariff upon the final delivery of the cattle at South Omaha could be adjusted. We can conceive of no theory upon which this could extend the provision in the bill-of-lading issued from Huntington to Minnedoka to the shipment upon arriving at South Omaha. It is not necessary to cite any authorities to the effect that these provisions are construed against the carrier and no idea suggests itself to us as to why this information so imparted to the initial carrier as to the contemplated final destination of this stock should make the provision of the bill-of-lading from Huntington to Minnedoka extend beyond its point of destination.

There is one other proposition along the same

line, and that is that upon the return of the plaintiff to Portland he secured and received a rebate of \$600.00, this being the amount that he paid in excess of what he would have paid if these cattle had gone through from Huntington to Omaha on a through billing, but we cannot conceive of any proposition of law by which this act of the plaintiff in receiving a rebate of \$600.00 would make this stipulation in the contract shipping the cattle from Huntington to Minnedoka cover the shipment from American Falls to South Omaha.

We therefore most respectfully submit to this court that a careful consideration of the points advanced in this petition will convince the court that our contention herein is right and that this petition for a rehearing should be granted and the case remanded for a new trial.

Respectfully submitted,

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